91-2078

No. _____

Supreme Court, U.S.
FILED
JUN 22 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

MARION LIBBIE KAMISUGI,
Petitioner,

vs.

HEINZ KUHNERT and SHERILYN MARIE KUHNERT,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Hawaii

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Dated: June 22, 1992

QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner Marion Libbie Kamisugi ("Kamisugi") was deprived of her due process rights, as set forth in the United States Constitution and the Hawaii Constitution, as a result of punitive damages being assessed against her where there was no evidence of her individual culpability and she was not properly held vicariously liable for the acts of another.

II. Whether Kamisugi was deprived of her due process rights, as set forth in the United States Constitution and the Hawaii Constitution, as a result of punitive damages being assessed against her jointly and severally with a co-defendant without apportioning those damages according to Kamisugi's individual culpability.

III. Whether Kamisugi was deprived of her due process rights, as set forth in the United States Constitution and the Hawaii Constitution, when the wealth of a co-defendant was considered in assessing punitive damages for which Kamisugi is jointly and severally liable.

IV. Whether the denial of Kamisugi's right to obtain an independent determination of her individual liability, as opposed to a joint determination of the claims against Kamisugi and a co-defendant, deprived Kamisugi of her due process rights as set forth in the United States Constitution and the Hawaii Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were: Heinz W. Kuhnert, Sherilyn Marie Kuhnert, Clyde H. Allison, Libbie & Company, Inc., a Hawaii corporation, Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman.

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MARION LIBBIE KAMISUGI,
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HEINZ KUHNERT and SHERILYN MARIE KUHNERT,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Hawaii

Petitioner Marion Libbie Kamisugi respectfully petitions this Court for a writ of certiorari to review the Judgment On Appeal entered by the Supreme Court of Hawaii on March 25, 1992.

OPINIONS BELOW

The Judgment On Appeal of the Supreme Court of Hawaii is unreported, and appears in Appendix A. The Supreme Court of Hawaii's Order Denying Kamisugi's Motion for Reconsideration is unreported, and appears in Appendix B. This petition for writ of certiorari is taken from the unreported opinion issued by the Supreme Court of Hawaii in Kuhnert v. Allison, et al., No. 14956, slip. op. (Supreme Court of Hawaii, March 13, 1992)(memorandum opinion). The opinion is attached hereto as Appendix D.

JURISDICTION

On March 25, 1992, the Supreme Court of Hawaii entered its Judgment On Appeal in this action. See App. A at A1. The Judgment On Appeal affirmed the First Amended Judgment issued by the Circuit Court of the First Circuit, State of Hawaii on October 18, 1990. See App. B at A14.

Prior to the Judgment On Appeal being entered, the Supreme Court of Hawaii had issued its opinion in this matter on March 13, 1992. See App. D at A80. On March 23, 1992, Petitioner Marion Libbie Kamisugi filed a Motion For Reconsideration. See App. C at A16. On March 25, 1992, the Supreme Court of Hawaii denied the Motion For Reconsideration by way of an Order Denying Motion For Reconsideration. See App. B at A14.

Pursuant to 28 U.S.C. §1257, jurisdiction is conferred upon this Court to review the Supreme Court of Hawaii's Judgment On Appeal by way of a writ of certiorari.

PROVISIONS OF LAW

This petition is based upon the due process requirements set forth in the United States Constitution and the Hawaii Constitution, respectively.

The United States Constitution states in pertinent part:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1 (emphasis added).

The Hawaii Constitution sets forth a due process requirement as follows:

> **Section 5.** No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Haw. Const. art. 1, §5 (emphasis added).

STATEMENT OF THE CASE

This is an appeal from a trial court judgment assessing compensatory and punitive damages totaling $948,360, plus post judgment interest, against Kamisugi for her purported involvement in a real estate transaction. The judgment was assessed against Kamisugi even though there was no direct evidence of personal wrongdoing on her part. Instead, the judgment was the result of an improper form of special verdict which prevented the jury from making an independent evaluation of Kamisugi's alleged conduct. See App. I at A146. In fact, for every claim asserted against Kamisugi, the jury was forced to consider her liability jointly with the liability asserted against a separate corporate defendant, Libbie & Company ("the Company"). Thus, it was impossible for the jury to answer any of the questions pertaining to Kamisugi personally without incorporating their evaluation of the Company's alleged wrongdoing.

Following the entry of the jury verdict, the trial court remitted a significant portion of the punitive damages assessed against Kamisugi because the jury verdict was clearly tainted by passion and prejudice. However, the trial court allowed a million dollar judgment to be entered against Kamisugi because she purportedly "conspired" with other defendants to defraud the plaintiffs. The trial court relied upon a conspiracy theory even though that cause of action was never pled by the plaintiffs. Moreover, the award of punitive damages against Kamisugi was assessed on a joint and several basis with the Company. Therefore, the judgment against Kamisugi failed to consider her individual culpability or her individual financial worth.

On appeal, the Supreme Court of Hawaii recognized the problems involving the conspiracy theory and the

assessment of punitive damages. Nevertheless, the court affirmed the judgment against Kamisugi without citing any specific factual or legal references in support of the extreme award of damages against Kamisugi. See App. D at A80.

The unfounded judgment against Kamisugi is the result of the trial and appellate court's inability, or refusal, to examine the matters as related to Kamisugi's individual liability. Throughout the underlying proceedings, Kamisugi has been wrongly treated as a "Siamese twin" of the Company - somehow joined together at the hip and incapable of independent conduct. This improper commingling of the Company's culpability with the separate factual and legal bases germane to Kamisugi's defense have denied Kamisugi an opportunity to obtain a fair trial governed by considerations of due process.

Kamisugi seeks redress from this Court for the procedural and substantive due process violations which occurred during the trial of this action before the Circuit Court of the First Circuit, State of Hawaii ("trial court").

A. Factual Background.

This action was initiated by Heinz and Sherilyn Kuhnert ("the Kuhnerts") and arose out of the sale of the Kuhnerts' residence ("the Property") to David and Darlene Osterman ("the Ostermans").

On August 23, 1982, the Kuhnerts entered into an exclusive listing agreement ("listing agreement") with Libbie & Company ("the Company") which gave the Company the right to market the Property. The Company possessed a real estate brokers license in accordance with the laws of the State of Hawaii. The listing agreement was executed by real

estate agent Clyde Allison ("Allison") on behalf of the Company. At that time, Allison was employed by the Company. Kamisugi, who is the owner of the Company and holds her own real estate license, did not sign the listing agreement.

Subsequently, with the assistance of Allison, the Kuhnerts entered into an agreement to sell the Property to the Ostermans. A sales agreement was executed by the Kuhnerts and the Ostermans on June 23, 1983. Allison was the only employee of the Company present at the signing of the sales agreement.

The terms of the sale of the Property involved a cash down payment by the Ostermans, with the remaining balance to be paid from the proceeds of the sale of the Ostermans' condominium. In the event the condominium was not sold within two years of the sale of the Property by the Kuhnerts to the Ostermans, the Kuhnerts agreed to purchase the condominium at a pre-agreed price. The terms of the sales agreement are not disputed by any of the parties. Moreover, it is undisputed that the condominium did not sell within the specified time period. Therefore, the result of the transaction was that the Kuhnerts sold the Property to Ostermans and in exchange received cash and the Ostermans' condominium unit.

In their Complaint, the Kuhnerts named four defendants: 1) the Ostermans; 2) Allison; 3) the Company; and 4) Kamisugi. See App. M at A188. The Complaint alleged fraudulent inducement, promissory estoppel, breach of fiduciary duty, and unfair and deceptive trade practices. The crux of the Kuhnerts' Complaint were the allegations of fraudulent inducement. The Kuhnerts claimed that they were misled into signing the sales agreement with the Ostermans

because of fraudulent misrepresentations and/or concealment of material facts. Specifically, the Kuhnerts contended that the Ostermans, Allison, the Company and Kamisugi fraudulently induced the Kuhnerts into accepting the Ostermans' allegedly over-valued condominium as part of the purchase price for the Kuhnerts' Property.

By way of the Complaint, the Kuhnerts sought to rescind the sale of the Property and/or to recover compensatory and punitive damages. Neither the Complaint, nor the pre-trial statement filed by Plaintiffs which identified their specific causes of action, contained a cause of action for conspiracy. See App. M at A188, App. L at A161.

The following undisputed facts where established in the record: (a) the Company had a real estate brokers license separate from the license of Kamisugi; (b) Kamisugi did not inspect the Ostermans' condominium with Allison; (c) Kamisugi did not provide specific input to the valuation of the Ostermans' condominium; (d) Kamisugi was not present at the June 23, 1983 meeting when the sales agreement was executed; (e) Kamisugi did not prepare the subject sales agreement for signature by the parties; and (f) Kamisugi did not review the sales agreement until the fully executed sales agreement was presented to her.

The only personal involvement by Kamisugi established in the record is as follows: 1) Kamisugi was generally aware that Allison was working on the transaction; 2) Allison asked Kamisugi whether it was theoretically possible to structure a transaction where part of the sales price would be guaranteed by the sale of property owned by the buyer -- when asked about this, Kamisugi was unaware it was with regard to this particular Property; and 3) there is testimony by Mr. Kuhnert that he had a telephone

conversation with Kamisugi during which she indicated she would not be attending the meeting at which the sales agreement would be signed -- Kamisugi testified that no such call was made.

B. Trial Court Proceedings.

During the trial of this case, a Special Verdict form was submitted by the trial court which forced the jury to consider the claims against Kamisugi jointly with the claims against a separate co-defendant, the Company, on every question submitted by the trial court. Thus, it was impossible for the jury to answer any of the questions pertaining to Kamisugi personally without incorporating their evaluation of the Company's alleged wrongdoing. The trial court, and subsequently the Supreme Court of Hawaii, could only guess as to the basis for the jury's findings against Kamisugi.

For example, with regard to the issue of punitive damages, the jury was forced to assess punitive damages against Kamisugi in conjunction with the assessment of punitive damages against the Company (her "Siamese Twin"). The Special Verdict form read in pertinent part:

> Should any defendant be assessed with punitive damages?
>
> Yes ___ No ___
>
> If so, place the amount of such assessment by such defendant or defendants:
>
> Clyde H. Allison and
> Libbie & Company, Inc. $ _____

Libbie Kamisugi and
Libbie & Company, Inc. $ _____

Darlene M. Osterman $ _____

David Osterman $ _____

See App. I at A146. (emphasis added).

Given this verdict form, the jury was never given the opportunity to consider Kamisugi's individual culpability in determining whether Kamisugi should be liable for punitive damages. Rather, the jury was constrained to assess punitive damages against Kamisugi in combination with the Company's culpability.

Moreover, the jury was required to lump its punitive damages assessment against Kamisugi and the Company into one amount. Thus, there is no indication as to what portion of the award should be paid by Kamisugi based on her individual culpability, and what portion should be paid by the Company based on its respective culpability. In short, the jury was constrained to assess punitive damages against Kamisugi jointly with the Company. Punitive damages in the amount of $1,465,000.00 were thus assessed by the jury against Kamisugi and the Company.[1]

The Judgment entered by the trial court further establishes that the punitive damages award against Kamisugi

[1]Punitive damages were also assessed against the other defendants as follows: 1) Allison and the Company, jointly and severally, in the amount of $500,000.00, 2) Darlene Osterman in the amount of $250,000.00; and 3) David Osterman in the amount of $250,000.00. Kamisugi was also assessed with joint and several liability for special and general damages of $528,625.00.

was assessed jointly and severally with the Company. The Judgment states in pertinent part:

> Punitive Damages
>
> . . . .
>
> 2. Against Defendant Marion Libbie Kamisugi and/or Defendant Libbie & Company, Inc., Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of One Million Four Hundred Sixty-Five Thousand and no/100ths Dollars ($1,465,000.00).
>
> See App. H at A139. (emphasis added).

C. Post-Trial Motions.

Following the entry of the jury verdict, Kamisugi filed post-trial motions for judgment notwithstanding the verdict, new trial, or remittitur. Although the trial court remitted a significant portion of the punitive damages against Kamisugi because the jury's award was clearly the result of passion and prejudice, the trial court allowed a million dollar judgment to be entered against Kamisugi because she purportedly "conspired" with other defendants to defraud the Plaintiffs.[2] The miscarriage of justice arising from this "phantom" conspiracy claim is evidenced by the trial judge's stated reliance (twice) on a conspiracy theory where no such claim was ever pled by the Plaintiffs. During the hearings on the post trial motions, the trial judge stated:

[2]The trial court refused to consider the prejudicial error arising from the form of Special Verdict on the grounds that trial counsel for Kamisugi had waived such objections at the time of trial.

> The Court finds that all though (sic) the question is not an easy one, there was substantial evidence from which the jury could find that the defendants Clyde Allison, Libbie Kamisugi, Darlene and David Osterman conspired together to defraud the plaintiffs. . . (Emphasis added).

See App. G at A132. The trial judge reaffirmed his reliance on a conspiracy theory when ruling on Kamisugi's motion for remittitur:

> Turning to defendant Libbie Kamisugi, this Court finds that there was substantial evidence from which the jury could find that the defendants Clyde Allison, Libbie Kamisugi, Darlene and David Osterman conspired together to defraud plaintiffs. . . (Emphasis added).

See App. F at A109.

It is abundantly clear that the trial judge relied on a conspiracy theory to justify the judgment against Kamisugi individually even though that cause of action was never pled by the plaintiffs. In fact, the only specific reference to a claim of conspiracy was set forth in a jury instruction which incorrectly defined the elements of a conspiracy. See App. J at A153. That instruction was grossly defective because it failed to mention any element of unlawfulness and failed to contain any statement concerning the applicability of the "clear and convincing" standard of proof. Doleman v. Meiji Mutual Life Ins. Co., 727 F.2d 1480 (9th Cir. 1984).[3]

---

[3]In its Memorandum Opinion, the Supreme Court of Hawaii addressed the erroneous jury instruction by stating that "it is likely that the trial judge, had the instruction been objected to, would have refused it at the time instructions were

As a result of a remittitur granted by the trial court, the First Amended Judgment was issued, which reads in part:

> PUNITIVE DAMAGES
>
> 2. Against Defendant Marion Libbie Kamisugi and/or Defendant Libbie & Company, Inc., Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of Two Hundred Ninety-Three Thousand and no/100ths Dollars ($293,000.00). The cumulative amount of punitive damages owed by Defendant Marion Libbie Kamisugi and Libbie & Company, Inc., is $293,000.00. Payment by either Defendant shall reduce the principle sum owed.

See App. E at A96. (emphasis added).

Due to the trial court's submission of the Special Verdict form to the jury, and the court's own fashioning of the award as set forth in the First Amended Judgment, Kamisugi is now liable for the entire amount of compensatory and punitive damages jointly assessed against her and the Company, regardless of her individual culpability and financial worth.

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settled, . . . " See App. D at A91. Although the Supreme Court of Hawaii attempted to minimize the significance of the error by explaining that "viewing the instructions as a whole, we find no plain error," the court failed to address irreparable injustice caused by allowing an entire proceeding to be adjudicated on a non-existing cause of action.

D. Appeal To The Supreme Court of Hawaii.

In her appeal to the Supreme Court of Hawaii, Kamisugi specifically argued that the submission of the Special Verdict was erroneous because: a) the Special Verdict prevented the jury from applying the evidence and law to Kamisugi individually, thereby allowing the jury to assess liability against Kamisugi based on the conduct of other defendants; b) the Special Verdict resulted in the assessment of joint and several liability against Kamisugi and the Company for punitive damages; c) the Special Verdict allowed the jury to assess punitive damages against Kamisugi based upon vicarious liability for the acts of the Company; and d) the Special Verdict prevented Kamisugi from obtaining an independent determination of her individual liability. In addition, Kamisugi argued that there was no substantial evidence to support the judgment against her, and that the "phantom" conspiracy claim was erroneously stated in a jury instruction and inappropriately cited by the trial court.

In a Memorandum Opinion, the Supreme Court of Hawaii recognized the problems involving the conspiracy theory and the assessment of punitive damages, but nevertheless affirmed the First Amended Judgment entered by the trial court. See App. D at A80.

In her Motion For Reconsideration before the Supreme Court of Hawaii filed March 23, 1992, Kamisugi specifically asserted that the imposition of punitive damages under the circumstances of this case deprived her of property without due process of law under the United States Constitution and the Hawaii Constitution. See App. C at A16.

Kamisugi argued that, given this Court's opinion in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), the submission of the Special Verdict to the jury, and the trial court's sua sponte imposition of punitive damages jointly and severally against Kamisugi without consideration of her individual culpability, rose to the level of a due process violation. In essence, the assessment of punitive damages against Kamisugi was not in relation to her individual culpability, but the culpability of the Company as well. See App. C at A16.

Moreover, pursuant to this Court's decision in Washington Gaslight Co. v. Landsen, 172 U.S. 534, 19 S.Ct. 296, 43 L.Ed. 543 (1899), Kamisugi asserted a due process violation by the trial court in allowing the jury to cumulate the financial worth of both Kamisugi and the Company in determining the amount of punitive damages. Kamisugi argued that this was tantamount to the type of unchecked discretion which "cross[ed] the line into the area of constitutional impropriety." Haslip, 499 U.S. at ___, 111 S.Ct. at 1046, 113 L.Ed.2d at 23. See App. C at A16.

By way of its Memorandum Opinion and Order Denying Motion For Reconsideration, the Supreme Court of Hawaii addressed and passed upon the due process claims asserted by Kamisugi. See App. D at A80, App. B at A14.

REASONS FOR GRANTING THE WRIT

This case warrants immediate review by this Court because the first, second and third questions presented raise federal questions which were decided by the Supreme Court of Hawaii contrary to this Court's ruling in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. ___, 111 S.Ct. 1032,

113 L.Ed.2d 1 (1991). The third question presented also raises a federal issue decided contrary to Washington Gaslight Co. v. Landsen, 172 U.S. 534, 19 S.Ct. 296, 43 L.Ed. 543 (1899).

The second question presented, regarding the apportionment of punitive damages between joint tortfeasors, has also generated conflicting decisions among the twenty three jurisdictions which have addressed the issue.

Furthermore, this case warrants review by this Court since the fourth question presented raises an important question of federal law decided by the Supreme Court of Hawaii which should be decided by this Court.

I. The Decision Below Conflicts With Haslip In That It Was Not Reasonable To Impose Punitive Damages Against Kamisugi Given The Lack Of Wrongdoing On Her Part And The Fact That Allison's Conduct Cannot Properly Flow To Kamisugi Under Vicarious Liability Theory

Both the United States and Hawaii Constitutions specifically prohibit the state from "depriv[ing] any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, Sec. 1; see also Hawaii Const. art. I, Sec. 5. Under the circumstances of this case, the award of punitive damages, jointly and severally, against Kamisugi and the Company clearly deprives Kamisugi of property without due process of law in violation of the federal and state constitutions.

The United States Supreme Court recently held that an award of punitive damage violates the Due Process Clause

of the Fourteenth Amendment unless: 1) the award is reasonable given the circumstances of the case; and 2) there were sufficient procedural safeguards in assessing and reviewing the award such that the discretion of the fact finder was properly constrained. See Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. __, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); see also Eichenseer v. Reserve Life Insurance Co., 934 F.2d 1377 (5th Cir. 1991). Although the Haslip Court ultimately rejected the due process challenge to an award of punitive damages, the Court explicitly noted that under certain circumstances an award of punitive damages may "cross the line into the area of constitutional impropriety." Id. at __, 111 S.Ct. at 1046, 113 L.Ed.2d at 23. In this regard, the Court eschewed a formal due process standard:

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.

Id. at __, 111 S.Ct. at 1043, 113 L.Ed.2d at 20 (emphasis added).

The Court reasoned that unlimited discretion in the fashioning of an award of punitive damages invites "extreme results that jar one's constitutional sensibilities." Id. at __, 111 S.Ct. at 1043, 113 L.Ed.2d at 20. Accordingly, the Court concluded that an award of punitive damages violates the Due Process Clause unless procedural protections adequately control the discretion of the jury to fashion a punitive damage award. Hence, the improper assessment of punitive damages has been elevated to a federal question.

In applying the general Due Process principles to the circumstances in Haslip, this Court analyzed three areas: a) the instructions given to the jury; b) the post-trial procedures for review of the punitive damages award; and c) the existence of established criteria for appellate review of punitive damages. In each area, the importance of assessing punitive damages according to its historical purpose of punishing the defendant's individual conduct was emphasized.

With regard to the instructions given to the jury, this Court ruled that the jury's discretion was properly limited by the instruction that it "must take into consideration the character and the degree of the wrong as shown by the evidence". Haslip, 499 U.S. at ___, 113 L.Ed.2d at 21, 111 S.Ct. at 1044. These instructions, the Court noted, furthered and accommodated the state's purpose in providing "meaningful individualized assessment of appropriate deterrence and retribution." Haslip, Id. (emphasis added).

With regard to post-trial procedures for reviewing a punitive damages award, it was recognized that one of the factors crucial to the trial court's consideration is the "culpability of the defendant's conduct". Haslip, Id. (emphasis added).

Finally, with regard to the established criteria for appellate review, this Court cited the fact that one important consideration was "the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct." Haslip, 499 U.S. ___, 113 L.Ed.2d at 22, 111 S.Ct. at 1045 (emphasis added).

In the instant case, the historical purpose of punitive damages -- the punishment and deterrence of individual conduct -- has been ignored. Not only was the jury allowed to make a combined punitive damages award against Kamisugi and the Company, but Kamisugi is responsible for the entire amount assessed against both.

The trial court clearly failed to adequately guide the jury in determining punitive damages. Although the jury instructions may have provided adequate guidance for the jury's determination of punitive damages, these instructions were thwarted by the Special Verdict form, which set out a clearly erroneous framework for the imposition of punitive damages. More specifically, the Special Verdict form allowed the jury to award punitive damages against Kamisugi without a specific determination that Kamisugi, individually, had acted in a manner warranting the imposition of punitive damages. The Special Verdict form absolutely permitted the jury to assess punitive damages against Kamisugi based on the conduct of the Company. Moreover, in the event the jury found that the Company's conduct warranted punitive damages, the Special Verdict form required the jury to also impose punitive damages upon Kamisugi. Such an extreme and arbitrary imposition of punitive damages violates all notions of fundamental fairness and certainly, under Haslip, is unreasonable.

Just as there was no clear and convincing evidence that Kamisugi committed fraud, there was no reasonable basis upon which Kamisugi could have been deemed vicariously liable for the conduct of Allison and/or the Company. It is widely recognized that absent active or passive participation in such wrongful conduct, Kamisugi cannot be held personally and vicariously liable for the alleged fraud committed by the Company and/or its other

agents and employees. Hagemeyer Chemical Co. v. Insect-O-Lite Co., 291 F.2d 696 (6th Cir. 1961); Cahill v. Hawaiian Paradise Park Corporation, 56 Haw. 522, 543 P.2d 1356 (1975).

In Eastern Star, Inc. v. Building Materials Corp., 6 Haw. App. 125, 712 P.2d 1148 (1985), the Intermediate Court of Appeals of Hawaii held that "corporate officers, directors, or shareholders are not personally liable for the tortious conduct of the corporation or its other agents, unless there can be found some active or passive participation in such wrongful conduct by such person." Id. 6 Haw. App. at 134, 712 P.2d at 1155. Thus, the verdict against Kamisugi for fraud cannot stand since there was no "clear and convincing" evidence that Kamisugi personally committed fraud.

In this regard, it is widely recognized that an officer of a corporation is not vicariously liable for the wrongdoing of the corporation absent participation by the officer in the wrongful act. In Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 543 P.2d 1356 (1975), the plaintiff claiming defamation from a radio broadcast brought a cause of action against the corporation which owned the station, the president of the corporation, and the manager of the station. The court held that the president of the corporation was not personally liable for the alleged defamatory remarks made by the radio station manager and the corporation. The court held:

> The law is firmly established that officers or directors or shareholders of a corporation are not personally liable for the tortious conduct of the corporation or its other agents, unless there can be found some active

> or passive participation in such wrongful conduct by such persons. (Citations omitted)

Cahill, 56 Haw. at 526, 543 P.2d at 1360.

The present result is fundamentally unjust and contrary to the due process concerns articulated by this Court in Haslip. First, it is unreasonable given the concern expressed in Haslip that punitive damages be imposed according to its historical purpose of punishing individualized conduct. Second, there was a total lack of procedural safeguards to constrain the jury and the trial court to this historical purpose. Throughout the trial of this action, including the use of the Special Verdict form and the trial court's post-trial review, Kamisugi and the Company were treated as opposite sides of the same coin. In short, Kamisugi was never given the opportunity to have her conduct considered on its own merits.

II. The Decision Below Not To Apportion Kamisugi's Joint and Several Liability For Punitive Damages According To Her Individual Culpability Conflicts With Decisions By Sixteen Other States And Is Contrary To This Court's Ruling In Haslip

In this case, the record establishes that Kamisugi had no material role in the transaction from which this suit arose. At most, the record establishes that Kamisugi had a generalized knowledge that the transaction was being handled by Allison. Regardless of these facts, punitive damages have been assessed against Kamisugi jointly and severally with the Company. There has been no apportionment of the award

between Kamisugi and the Company based on their respective culpability.

Hence, unless redress is provided by this Court, Kamisugi will be liable for the entire amount of punitive damages which has been assessed against her and the Company jointly, without any relation being established between the amount she must pay and her individual culpability in this action.

Twenty-three states, with conflicting results, have addressed the issue of whether punitive damages should be apportioned among joint tortfeasors based upon individual culpability. See Annotation, Apportionment of Punitive Or Exemplary Damages As Between Joint Tortfeasors, 20 A.L.R.3d 666 (1968). Moreover, this Court has recognized that the imposition of punitive damages is restricted by due process principles. Pacific Mutual Life Insurance Company v. Haslip, 499 U.S. ___, 113 L.Ed.2d 1, 111 S.Ct. 1032 (1991); Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc., 492 U.S. 257, 106 L.Ed.2d 219, 109 S.Ct. 2909 (1989). Given the decision by the Supreme Court of Hawaii enforcing non-apportioned joint and several liability for punitive damages and the disparity between the states which have addressed this issue, review by this Court is proper to clarify the ruling in Haslip and to reconcile the differing results reached by the various jurisdictions.

Of the twenty-three states which have addressed the issue of whether punitive damages should be apportioned among joint tortfeasors, sixteen states have recognized the importance of assessing punitive damages according to individual culpability and therefore of apportioning those

damages.[4] Davis v. Hearst, 160 Cal. 143, 116 P. 530 (1911); Central Passenger R. Co. v. Kuhn, 86 Ky. 578, 6 S.W. 441 (1888); Embrey v. Holly, 293 Md. 128, 442 A.2d 966 (1982); Rauma v. Lamont, 82 Minn. 477, 85 N.W. 236 (1901); State ex rel. Hall v. Cook, 400 S.W.2d 39 (Mo. 1966); Edquest v. Tripp & Dragstedt Co., 93 Mont 446, 19 P.2d 637 (1933); Hotel Riviera, Inc. v. Short, 80 Nev. 505, 396 P.2d 855 (1964); Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc., 542 P.2d 52 (N.M. App. 1975); Latasa v. Aron, 59 Misc. 26, 109 N.Y.S. 744 (1908); McCurdy v. Hughes, 63 N.D. 435, 248 N.W. 512 (1933); Mauk v. Brundage, 68 Ohio St. 89, 67 N.E. 152 (1903); Rose v. Whitbeck, 278 Or. 463, 564 P.2d 671 (1977); Fredericks v. Commercial Credit Co., 145 S.C. 380, 143 S.E. 179 (1928); Huckeby v. Spangler, 563 S.W.2d 555 (Tenn. 1978); St. Louis & S.W. Ry. Co. v. Thompson, 102 Tex. 89, 113 S.W. 144 (1908); Freeman v. Sproles, 204 Va. 353, 131 S.E.2d 410 (1963).

In seven states, apportionment of punitive damages based upon individual culpability is not allowed. General Motors Corp. v. Edwards, 482 So.2d 1176 (Ala. 1985); Chupp v. Henderson, 216 S.E.2d 366 (Ga. App. 1975); Pardridge v. Brady, 7 Ill. App. 639 (1881); Sieben v. Sieben, 231 Kan. 372, 646 P.2d 1036 (1982); McCarthy v. De Armit, 99 Pa. 63 (1881); Young v. Aylesworth, 35 R.I. 259, 86 A. 555 (1913); Boutwell v. Marr, 71 Vt. 1, 42 A 607 (1899).

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[4]Although these cases do not discuss this issue in terms of constitutional principles, it is because they pre-date Haslip, which was the first case decided by this Court recognizing the applicability of due process constraints with respect to punitive damages.

In Thomson v. Catalina, 205 Cal. 402, 271 P. 198 (1928), the Supreme Court of California upheld an award of punitive damages in differing amounts against joint tortfeasors. The court explained:

> it would seem to be a rule of reason that, where the defendants, though joint tortfeasors . . . have been guilty of different degrees of oppression, fraud, or malice so as to justify a verdict or verdicts for exemplary damages under the above-quoted section of the Code, and where such damages under said section are to be awarded 'for the sake of example and by way of punishing' each particular defendant according to the measure of his offending, juries should be allowed so to admeasure and apportion such exemplary damages as to make the example as well as the punishment fit the offense.
>
> 205 Cal. at 405-06, 271 P. at 200.

In Thomson, the court noted that apportionment was especially warranted since one of the defendants was a mere tool of the other defendants and played no active role in the resulting harm. As in Thomson, Kamisugi's role in the instant case was found to be minimal. Unlike Thomson, however, there has been no apportionment of punitive damages. Hence, the unjust result will obtain that Kamisugi's punishment will not "fit her offense".

In another illustrative case where conduct-based apportionment was upheld for punitive damages, the law of Maryland was set forth as follows:

> "It is axiomatic . . . that in appropriate cases (exemplary) damages are awarded, over and above

> full compensation, to punish the wrongdoer, to teach him not to repeat his wrongful conduct and to deter others from engaging in the same conduct." Many states, in recognition of these principles, have adopted the rule that punitive damages may be apportioned between wrongdoers either by providing varying amounts of such awards or by levying exemplary damages against some of the defendants but not others. In our view, this is the most sensible approach to the subject, for punitive damages, in order to be fair and effective, must relate to the degree of culpability exhibited by a particular defendant and that party's ability to pay. Punitive damages, in essence, represent a civil fine, and as such, should be imposed on an individual basis.
>
> Embrey v. Holly, 293 Md. 128, 141-42, 442 A.2d 966, 973 (Md. Ct. App. 1982)(emphasis added).

Clearly, in Embrey, the court recognized the fundamental fairness of requiring that, with respect to punitive damages, joint tortfeasors be assessed, and be held liable, according to their individual conduct. See also McFadden v. Sanchez, 710 F.2d 907, 913-14 (2nd Cir. 1983)(majority rule among states for imposition of punitive damages contemplates individual determination of each defendant's liability, as well as individual determination of the amount for which each defendant is liable).

The decision by the Supreme Court of Hawaii to enforce the award against Kamisugi in this case is in direct conflict with the sixteen states which have decided that punitive damages should be apportioned. Indeed, if this decision is allowed to stand, it would contradict the modern trend towards individualized assessment of such damages.

Given this Court's pronouncement in Haslip elevating punitive damages to a due process concern, review of the instant matter is appropriate and desirable. It would serve to resolve the present conflict among the states with regard to whether punitive damages must be apportioned among joint tortfeasors such that only individual conduct is punished.

III. The Decision Below To Allow Consideration Of A Co-Defendant's Wealth In Assessing Punitive Damages Is Contrary To This Court's Decision In Washington Gaslight

The punitive damages as assessed against Kamisugi and the Company was based on the cumulative financial worth of both. Consideration of the Company's wealth offends the traditional goal of punitive damages, especially where, as in this case, another defendant (Kamisugi) must bear the burden of the entire award.

Almost a century ago, this Court established that it would be fundamentally unjust to admit evidence regarding the wealth of one defendant in the determination of a punitive damages award for which another defendant may be held responsible to pay. Washington Gaslight Co. v. Landsen, 172 U.S. 534, 19 S.Ct. 296, 43 L.Ed. 543 (1899). Rather, this Court articulated a rule which "prevents evidence regarding the wealth of one of the defendants as a foundation for computing or determining the amount of such damages against all." Washington Gaslight, 172 U.S. at 553, 19 S.Ct. at 303.

This Court elaborated that evidence of another defendant's wealth in determining punitive damages was especially unjust where, as in the instant case, one award is made as to several defendants.

> [I]f the evidence is received on the assumption that it is material in relation to the corporation, the other defendants are affected by it the same as the corporation, and a verdict may very probably be enlarged against them, because of the evidence as to the ability of the corporation defendant to pay. The jury is thus permitted to take into consideration the wealth of one defendant, upon the question of the amount of the verdict against all of them.
>
> Washington Gaslight, 172 U.S. at 554, 19 S.Ct. at 304.

Given this Court's holding in Washington Gaslight, and the application of due process principles to punitive damages awards pursuant to Haslip, review by this Court is warranted as to whether evidence of the Company's wealth was properly considered in this case.

IV. The Denial Of Kamisugi's Right To Obtain An Independent Determination Of The Claims Against Her Presents An Important Federal Question Which Should Be Decided By This Court

The present judgment against Kamisugi is the result of an ongoing refusal by the trial court and Supreme Court of Hawaii to judge Kamisugi independently of the other defendants in the case.

The trial court forced the jury to treat Kamisugi as a "Siamese twin" of the Company by submitting a form of special verdict which listed Kamisugi jointly with the Company on every interrogatory. This improper commingling of the Company's culpability with the separate

factual and legal bases germane to Kamisugi's defense have denied Kamisugi an opportunity to obtain a fair trial governed by considerations of due process.

Following the entry of the jury verdict, the trial court allowed a million dollar judgment to be entered against Kamisugi because she purportedly "conspired" with other defendants to defraud the plaintiffs. The trial court was unable to point to any evidence which could reasonably support a finding of liability against Kamisugi individually. Instead, the trial court relied upon a conspiracy theory even though that cause of action was never pled by the plaintiffs. See App. F at A109, App. G. at A132.

The confusion between Kamisugi and the Company (which is owned by Kamisugi) continued in the Supreme Court of Hawaii. The court recognized the problems involving the conspiracy theory and the assessment of punitive damages against Kamisugi. Nevertheless, the court affirmed the judgment against Kamisugi without citing any specific factual or legal references in support of the extreme award of damages against Kamisugi. Instead, the Memorandum Opinion confirmed the court's own confusion over the distinction between Kamisugi, the individual, and the Company that she owned.

For example, the Memorandum Opinion mistakenly states: "Appellant Kamisugi, in her points of error, urges that the trial court erred in submitting the special verdict form to the jury because it was legally incorrect and confusing, and led to **double recovery**." See App. D at A88. Although there is no question that the Special Verdict was legally incorrect and confusing, Kamisugi never argued that she was the victim of "double recovery."

In her respective appellate briefs, Kamisugi specifically argued that the submission of the Special Verdict was erroneous because: a) the Special Verdict prevented the jury from applying the evidence and law to Kamisugi individually, thereby allowing the jury to assess liability against Kamisugi based on the conduct of other defendants; b) the Special Verdict resulted in the assessment of joint and several liability against Kamisugi and the Company for punitive damages; c) the Special Verdict allowed the jury to assess punitive damages against Kamisugi based upon vicarious liability for the acts of the Company; and d) the Special Verdict evidenced Kamisugi's inability to obtain an independent determination of her individual liability. Kamisugi's arguments and legal authorities were not touched upon in the Memorandum Opinion.

The court's misapprehension of Kamisugi's point of error apparently came from its review of the trial court transcripts whereby trial counsel for defendants expressed concern that the Special Verdict allowed the possibility of "double recovery" from Libbie & Company with respect to punitive damages. See App. K at A157. The concern was based on the duplicate listing of Libbie & Company on the Special Verdict. Kamisugi did not raise this argument on appeal. Indeed, it would be nonsensical for Kamisugi to claim "double recovery" since it was the Company, not Kamisugi, who was listed twice. Once again, in the eyes of the Court, Kamisugi was indistinguishable from the Company.

The ongoing refusal of the trial and appellate court to consider Kamisugi individually, rather than as an extension of the Company, has deprived Kamisugi of her due process rights to a fair trial on the merits.

CONCLUSION

For these reasons, this Court should issue a writ of certiorari to the Supreme Court of Hawaii.

Dated: June 22, 1992

Respectfully submitted,

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APPENDIX A

NO. 14956

IN THE SUPREME COURT OF THE
STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT, Plaintiffs-Appellees, Cross-Appellants, vs. CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation; MARION LIBBIE KAMISUGI; DARLENE M. OSTERMAN; HERBERT DAVID OSTERMAN, Defendants-Apellant. and	CIV. NO. 88-3197 APPEAL AND CROSS-APPEAL FROM THE: (1) JUDGMENT FILED AUGUST 7, 1990; (2) ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST FILED ON SEPTEMBER 6, 1990, ENTERED ON OCTOBER 18, 1990; (3) FIRST AMENDED NOTICE OF TAXATION OF COSTS; BILL OF COSTS FILED SEPTEMBER 20, 1990

John Doe 1-5, Doe Corporations 1-5, Doe Partnerships 1-5, and Doe Governmental Entity 1-5, Defendants.	(4) ORDER DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF FRAUD FILED ON APRIL 9, 1990, FILED MAY 21, 1990 (5) FIRST AMENDED JUDGMENT FILED OCTOBER 18, 1990; (6) ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT CLYDE H. ALLISON, LIBBIE & COMPANY,INC., DARLENE M. OSTERMAN AND HERBERT DAVID OSTERMAN'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE FOR NEW TRIAL OR

) REMITTITUR FILED
) JULY 27, 1990, FILED
) ON SEPTEMBER 6,
) 1990, DEFENDANT
) MARION LIBBIE
) KAMISUGI'S
) MOTION FOR
) JUDGMENT
) NOTWITHSTAND-
) ING THE VERDICT
) RENDERED ON JUNE
) 19, 1990, OR IN THE
) ALTERNATIVE FOR
) A NEW TRIAL OR
) REMITTITUR FILED
) ON JULY 27, 1990
) AND DEFENDANT
) MARION LIBBIE
) KAMISUGI'S
) AMENDED MOTION
) FILED ON AUGUST
) 20, 1990, FILED
) OCTOBER 18, 1990
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)	FIRST CIRCUIT
)	C O U R T
)	H O N O R A B L E
)	ROBERT G. KLEIN
)	H O N O R A B L E
)	PHILIP T. CHUN
)	H O N O R A B L E
)	TENNY TONGG
)	H O N O R A B L E
)	L E L A N D H.
)	SPENCER
)	Judges
)	

JUDGMENT ON APPEAL

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NO. 14956

IN THE SUPREME COURT OF THE
STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT, Plaintiffs-Appellees, Cross-Appellants, vs. CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation; MARION LIBBIE KAMISUGI; DARLENE M. OSTERMAN; HERBERT DAVID OSTERMAN, Defendants-Apellant. and John Doe 1-5, Doe Corporations 1-5, Doe Partnerships 1-5, and Doe Governmental Entity 1-5, Defendants.	CIV. NO. 88-3197 APPEAL AND CROSS-APPEAL FROM THE: (1) JUDGMENT FILED AUGUST 7, 1990; (2) ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST FILED ON SEPTEMBER 6, 1990, ENTERED ON OCTOBER 18, 1990; (3) FIRST AMENDED NOTICE OF TAXATION OF COSTS; BILL OF COSTS FILED SEPTEMBER 20, 1990

) (4) ORDER DENYING
) DEFENDANTS'
) MOTION FOR
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) JUDGMENT ON THE
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) 1990, FILED MAY 21,
) 1990
)
) (5) FIRST AMENDED
) JUDGMENT FILED
) OCTOBER 18, 1990;
)
) (6) ORDER DENYING
) IN PART AND
) GRANTING IN PART
) DEFENDANT CLYDE
) H. ALLISON, LIBBIE
) & COMPANY,INC.,
) DARLENE M.
) OSTERMAN AND
) HERBERT DAVID
) OSTERMAN'S
) MOTION FOR
) JUDGMENT
) NOTWITHSTAND-
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) OR, IN THE
) ALTERNATIVE FOR
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) A NEW TRIAL OR
) REMITTITUR FILED
) ON JULY 27, 1990
) AND DEFENDANT
) MARION LIBBIE
) KAMISUGI'S
) AMENDED MOTION
) FILED ON AUGUST
) 20, 1990, FILED
) OCTOBER 18, 1990
)
) FIRST CIRCUIT
) COURT
)
) HONORABLE
) ROBERT G. KLEIN
) HONORABLE
) PHILIP T. CHUN
) HONORABLE
) TENNY TONGG
) HONORABLE
) LELAND H.
) SPENCER
) Judges

) JUDGMENT ON
) APPEAL
_____)

JUDGMENT ON APPEAL

Pursuant to Memorandum Opinion of the Supreme Court of Hawaii entered herein on March 13, 1992, the First Amended Judgment of the Circuit Court of the First Circuit entered on October 18, 1990, is affirmed.

Dated: Honolulu, Hawaii, March 25, 1992.

BY THE COURT:

/s/ Sandra N. Yasui
Its Clerk

APPROVED:

/s/ Frank D. Padgett
JUSTICE OF THE COURT

(seal)

NO. 14956

IN THE SUPREME COURT OF THE
STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT, Plaintiffs-Appellees, Cross-Appellants, vs. CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation; MARION LIBBIE KAMISUGI; DARLENE M. OSTERMAN; HERBERT DAVID OSTERMAN, Defendants-Apellant. and John Doe 1-5, Doe Corporations 1-5, Doe Partnerships 1-5, and Doe Governmental Entity 1-5, Defendants.	)	CIV. NO. 88-3197 APPEAL AND CROSS-APPEAL FROM THE: (1) JUDGMENT FILED AUGUST 7, 1990; (2) ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST FILED ON SEPTEMBER 6, 1990, ENTERED ON OCTOBER 18, 1990; (3) FIRST AMENDED NOTICE OF TAXATION OF COSTS; BILL OF COSTS FILED SEPTEMBER 20, 1990

(4) ORDER DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF FRAUD FILED ON APRIL 9, 1990, FILED MAY 21, 1990

(5) FIRST AMENDED JUDGMENT FILED OCTOBER 18, 1990;

(6) ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT CLYDE H. ALLISON, LIBBIE & COMPANY,INC., DARLENE M. OSTERMAN AND HERBERT DAVID OSTERMAN'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE FOR NEW TRIAL OR

) REMITTITUR FILED
) JULY 27, 1990, FILED
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) A NEW TRIAL OR
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) KAMISUGI'S
) AMENDED MOTION
) FILED ON AUGUST
) 20, 1990, FILED
) OCTOBER 18, 1990
)
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)	FIRST CIRCUIT
)	COURT
)	
)	HONORABLE
)	ROBERT G. KLEIN
)	HONORABLE
)	PHILIP T. CHUN
)	HONORABLE
)	TENNY TONGG
)	HONORABLE
)	LELAND H.
)	SPENCER
)	Judges
)	
)	CERTIFICATE OF
_____)	SERVICE

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing document were served by hand delivery to the following persons:

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Dated: Honolulu, Hawaii, March 19, 1992.

/s/ Connie G.W. Meredith
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CONNIE G.W. MEREDITH
GERALD H. KURASHIMA

ATTORNEYS FOR PLAINTIFFS-APPELLEES, and CROSS-APPELLANTS

APPENDIX B

NO. 14956

IN THE SUPREME COURT OF THE
STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT, Plaintiffs-Appellees, Cross-Appellants, vs. CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation; MARION LIBBIE KAMISUGI; DARLENE M. OSTERMAN; and HERBERT DAVID OSTERMAN, Defendants-Appellants, Cross-Appellees, and JOHN DOE 1-5, DOE CORPORATIONS 1-5, DOE PARTNERSHIPS 1-5, and DOE GOVERNMENTAL ENTITY 1-5, Defendants.	CIV. NO. 88-3197 MOTION FOR RECONSIDERATION

ORDER DENYING MOTION FOR RECONSIDERATION

Upon consideration of appellant Marion Libbie Kamisugi's motion for reconsideration filed March 23, 1992, the joinder of appellants Darlene and Herbert Osterman filed the same day, the joinder of appellants Clyde Allison and Libbie & Company (filed on day late), the memoranda in support thereto, and the record below,

IT IS HEREBY ORDERED that the motion and the joinders to the motion are hereby denied.

APPENDIX C

NO. 14956

IN THE SUPREME COURT OF THE
STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT, Plaintiffs-Appellees, Cross-Appellants, vs. CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation; MARION LIBBIE KAMISUGI; DARLENE M. OSTERMAN; HERBERT DAVID OSTERMAN, John Doe 1-5, Doe Corporations 1-5, Doe Partnerships 1-5, and Doe Governmental Entity 1-5, Defendants-Apellant.	CIV. NO. 88-3197 APPEAL FROM THE (1) JUDGMENT ENTERED ON AUGUST 7, 1990; (2) "FIRST AMENDED JUDGMENT" ENTERED ON OCTOBER 18, 1990; (3) "ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST FILED ON SEPTEMBER 6, 1990," ENTERED ON OCTOBER 8, 1990; (4) "ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT CLYDE H. ALLISON, LIBBIE & COMPANY, INC.,

) DARLENE M.
) OSTERMAN AND
) HERBERT DAVID
) OSTERMAN'S
) MOTION FOR JUDG-
) MENT NOTWITH-
) STANDING THE
) VERDICT OR, IN
) THE ALTERNATIVE
) FOR NEW TRIAL OR
) REMITTITUR FILED
) JULY 27, 1990;
) DEFENDANTS
) CLYDE H. ALLISON,
) LIBBIE & COMPANY,
) INC., DARLENE
) OSTERMAN AND
) HERBERT DAVID
) OSTERMAN'S
) SUPPLEMENTAL
) MEMORANDUM IN
) SUPPORT OF THEIR
) MOTION FILED
) JULY 27, 1990, FILED
) ON AUGUST 20,
) 1990;
) SUPPLEMENTAL
) AFFIDAVIT OF JOHN
) HOUK IN SUPPORT
) OF DEFENDANTS'
) MOTION FILED
) JULY 27, 1990,
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) FILED ON
) SEPTEMBER 6, 1990;
) AND DEFENDANT
) MARION LIBBIE
) KAMISUGI'S
) MOTION FOR
) JUDGMENT
) NOTWITHSTANDING
) THE VERDICT
) RENDERED ON JUNE
) 19, 1990, OR IN THE
) ALTERNATIVE FOR
) A NEW TRIAL OR
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) DEFENDANT
) MARION LIBBIE
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APPELLANT MARION LIBBIE KAMISUGI'S
MOTION FOR RECONSIDERATION

MEMORANDUM IN SUPPORT OF MOTION

CERTIFICATE OF GOOD FAITH

CERTIFICATE OF SERVICE

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NO. 14956

IN THE SUPREME COURT OF THE
STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT,	)	CIV. NO. 88-3197
Plaintiffs-Appellees, Cross-Appellants,	)	APPEAL FROM THE (1) JUDGMENT ENTERED ON AUGUST 7, 1990; (2) "FIRST AMENDED JUDGMENT" ENTERED ON OCTOBER 18, 1990; (3) "ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST FILED ON SEPTEMBER 6, 1990," ENTERED ON OCTOBER 8, 1990; (4) "ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT CLYDE H. ALLISON, LIBBIE & COMPANY, INC., DARLENE M. OSTERMAN AND
vs.	)	
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation; MARION LIBBIE KAMISUGI; DARLENE M. OSTERMAN; HERBERT DAVID OSTERMAN, John Doe 1-5, Doe Corporations 1-5, Doe Partnerships 1-5, and Doe Governmental Entity 1-5,	)	
Defendants-Apellant.	)	

) HERBERT DAVID
) OSTERMAN'S
) MOTION FOR JUDG-
) MENT NOTWITH-
) STANDING THE
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APPELLANT MARION LIBBIE KAMISUGI'S
MOTION FOR RECONSIDERATION

Appellant MARION LIBBIE KAMISUGI, by and through her attorneys, McCorriston Miho & Miller, hereby moves this Court to reconsider its opinion filed March 13, 1992, affirming a million dollar judgment[1] against Kamisugi on the grounds that the opinion overlooked or misapprehended the following points of law and fact:

[1]The First Amended Judgment against Kamisugi totals $948,360.00 plus post judgment interest.

(1) KAMISUGI'S CHALLENGE TO THE ERRONEOUS SUBMISSION OF THE DEFECTIVE SPECIAL VERDICT WAS CLEARLY MISAPPREHENDED.[2]

The Memorandum Opinion mistakenly states: "Appellant Kamisugi, in her points of error, urges that the trial court erred in submitting the special verdict form to the jury because it was legally incorrect and confusing, and led to **double recovery**." (Emphasis added). Memorandum Opinion, p. 4. Although there is no question that the Special Verdict was legally incorrect and confusing, Kamisugi never argued that she was the victim of "double recovery."[3]

---

[2]See Kamisugi's Point on Appeal "A".

[3]This Court's misapprehension of Kamisugi's point of error apparently came from its review of the trial court transcripts. During the underlying trial, counsel for defendants expressed concern that the Special Verdict allowed the possibility of "double recovery" from Libbie & Company with respect to punitive damages. (Tr. 6/15/90:20-22). The concern was based on the duplicate listing of Libbie & Company on the Special Verdict. See Appendix A to Kamisugi's Opening Brief.

Kamisugi did not raise this argument on appeal. Indeed, it would be nonsensical for Kamisugi to claim "double recovery" since it was Libbie & Company, not Kamisugi, who was listed twice.

This confusion between Kamisugi, the individual, and Libbie & Company, the real estate firm owned by Kamisugi, is significant. Throughout

As set forth in her appellate briefs, Kamisugi specifically argued that the submission of the Special Verdict was erroneous because: a) the Special Verdict prevented the jury from applying the evidence and law to Kamisugi individually, thereby allowing the jury to assess punitive damages against Kamisugi based on the conduct and financial status of Libbie & Company; b) the Special Verdict resulted in the assessment of joint and several liability against Kamisugi and Libbie & Company for punitive damages; and c) the Special Verdict allowed the jury to assess punitive damages against Kamisugi based upon vicarious liability for the acts of Libbie & Company. See Kamisugi's Opening Brief, p. 8. Kamisugi's arguments and legal authorities were not touched upon in the Memorandum Opinion.

---

the trial process Kamisugi was prejudiced because she was treated as if she were interchangeable with Libbie & Company. This Court's own confusion between arguments relevant to Libbie & Company and those raised by Kamisugi highlights the ongoing prejudice to Kamisugi, the individual.

(2) THE DOCTRINE OF "PLAIN ERROR" WAS NOT PROPERLY ADDRESSED BY THIS COURT.

As evidenced by the Memorandum Opinion, this Court recognized at least two obvious errors made by the trial court: (a) "the somewhat complicated problems with respect to punitive damages" arising from the Special Verdict; and (b) the submission of the erroneous "conspiracy" instruction to the jury. However, the Memorandum Opinion fails to address the second prong of the plain error doctrine - the miscarriage of justice arising from the recognized errors. Turner v. Willis, 59 Haw. 319, 324, 582 P.2d 710, 714 (1978).

The erroneous Special Verdict has led to an unprecedented award of punitive damages. It is uncontroverted that punitive damages require a finding of "clear and convincing" evidence of wilful and wanton misconduct by the individual assessed with punitive damages. Moreover, the assessment of punitive damages must be based

on the consideration of that individual's conduct and financial resources. Here, Kamisugi was assessed with joint and several liability for punitive damages by a jury which was forced to consider the conduct and financial resources of both Kamisugi and Libbie & Company.

The manifest injustice arising from the erroneous jury instructions, particularly the conspiracy instruction, is equally clear. See Kamisugi's Point on Appeal "J". The Memorandum Opinion states that "it is likely that the trial judge, had the instruction been objected to, would have refused it at the time instructions were settled, . . . " Memorandum Opinion, p. 5. However, the Memorandum Opinion fails to address the miscarriage of justice arising from the trial judge's stated reliance (twice) on a conspiracy theory where no such claim was ever pled by the Plaintiffs (Tr. 8/29/90:65-66; Appendix D to Kamisugi's Opening

Brief) (Tr. 9/7/90:57; Appendix E to Kamisugi's Opening Brief).[4]

(3) THIS COURT MISAPPREHENDED THE SCOPE OF KAMISUGI'S RELATIONSHIP WITH THE RESPECTIVE PARTIES AND THE NATURE OF HER INVOLVEMENT WITH THE SUBJECT TRANSACTION.[5]

This Court failed to note the following undisputed facts which highlight the manifest injustice arising from the imposition of punitive damages against Kamisugi: (a) Libbie & Company had a real estate brokers license separate from the license of Kamisugi (R:V1:1; R:V1:27); (b) Kamisugi did not inspect the Ostermans' penthouse

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[4]During the hearings on the post trial motions, the trial judge stated: "The Court finds that all though (sic) the question is not an easy one, there was substantial evidence from which the jury could find that the defendants Clyde Allison, Libbie Kamisugi, Darlene and David Osterman conspired together to defraud the plaintiffs. . ." (Emphasis added). See Kamisugi's Appendix D.

The trial judge reaffirmed his reliance on a conspiracy theory when ruling on Kamisugi's motion for remittitur: "Turning to defendant Libbie Kamisugi, this Court finds that there was substantial evidence from which the jury could find that the defendants Clyde Allison, Libbie Kamisugi, Darlene and David Osterman conspired together to defraud plaintiffs. . ." (Emphasis added). See Kamisugi's Appendix E.

[5]See Kamisugi's Points on Appeal "B" - "H".

condominium with Clyde Allison (Tr. 5/16/90:136-141); (c) Kamisugi did not provide specific input to the valuation of the Ostermans' penthouse condominium (Tr. 5/16/90:136-140); (d) Kamisugi was not present at the June 23, 1983 meeting when the DROA was executed (Tr. 5/16/90:150-162; Tr. 6/6/90:142); (e) Kamisugi did not prepare the subject DROA for signature by the parties (Tr. 5/16/90:150-162; Tr. 6/6/90:142); and (f) Kamisugi did not review the DROA until the fully executed DROA was presented to her at the Waikiki Yacht Club (Tr. 5/22/90:32-65).

The Memorandum Opinion fails to identify any evidence, whether direct or circumstantial, which could possibly support the outrageous verdict against Kamisugi. Instead, the Memorandum Opinion merely concludes that "there was abundant circumstantial evidence to support a verdict of fraud." (Emphasis added). Memorandum Opinion, p.4. This reference to "circumstantial" evidence parallels the trial court's determination that Kamisugi's

liability could be justified only through the existence of a "conspiracy." See Paragraph (2) above. The admittedly erroneous conspiracy instruction was defective in two respects. First, it failed to mention that the "conspiracy" had to be for an unlawful purpose. Second, it failed to instruct the jury that the standard of proof for conspiracy is clear and convincing evidence.

It is unprecedented that punitive damages be imposed on an individual based merely upon circumstantial evidence, absent "clear and convincing" evidence of participation by that individual in wilful and wanton misconduct.

(4) THE IMPOSITION OF PUNITIVE DAMAGES AGAINST KAMISUGI, UNDER THE CIRCUMSTANCES OF THIS CASE, DEPRIVES KAMISUGI OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF BOTH THE UNITED STATES AND HAWAII CONSTITUTIONS.

Both the United States and Hawaii Constitutions specifically prohibit the state from "depriv[ing]

any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, Sec. 1; see also Hawaii Const. art. I, Sec. 5. Under the circumstances of this case, the award of punitive damages, jointly and severally, against Kamisugi and Libbie & Company clearly deprives Kamisugi of property without due process of law in violation of the federal and state constitutions.

This motion is made pursuant to Rule 40 of the Hawaii Rules of Appellate Procedure and is based upon the memorandum of law and certificate of good faith attached hereto, and the records and files in this case.

DATED: Honolulu, Hawaii, March 23, 1992

/s/ John Y. Yamano
WILLIAM C. McCORRISTON
JERROLD Y. CHUN
JOHN Y. YAMANO
Attorneys for Defendant-Appellant
MARION LIBBIE KAMISUGI

NO. 14956

IN THE SUPREME COURT OF THE
STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT, Plaintiffs-Appellees, Cross-Appellants, vs. CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation; MARION LIBBIE KAMISUGI; DARLENE M. OSTERMAN; HERBERT DAVID OSTERMAN, John Doe 1-5, Doe Corporations 1-5, Doe Partnerships 1-5, and Doe Governmental Entity 1-5, Defendants-Apellant.	)	CIV. NO. 88-3197 APPEAL FROM THE (1) JUDGMENT ENTERED ON AUGUST 7, 1990; (2) "FIRST AMENDED JUDGMENT" ENTERED ON OCTOBER 18, 1990; (3) "ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PREJUDGMENT INTEREST FILED ON SEPTEMBER 6, 1990," ENTERED ON OCTOBER 8, 1990; (4) "ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT CLYDE H. ALLISON, LIBBIE & COMPANY, INC., DARLENE M. OSTERMAN AND

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

On March 13, 1992, this Court rejected Marion Libbie Kamisugi's plea for judicial relief from an unconscionable jury verdict. Kamisugi now faces personal liability for damages totaling $948,360.00, plus post judgment interest. See First Amended Judgment (R:V7:109). It is a gross miscarriage of justice to impose over $1 million in damages against Kamisugi where: (a) it is undisputed that she had no direct involvement in the procurement or

consummation of the subject DROA; (b) the jury verdict was the result of a series of errors and omissions at the trial court; and (c) the Memorandum Opinion only concludes (without any specific factual or legal references) that "there was abundant circumstantial evidence to support a verdict of fraud" against Kamisugi.

Justice demands that this Court reconsider the Memorandum Opinion, and directly address the plethora of errors committed in the trial court which led to the outrageous verdict against Kamisugi. While some of these errors were acknowledged in the Memorandum Opinion (i.e "the somewhat complicated problems with respect to punitive damages" arising from the Special Verdict, and the erroneous "conspiracy" jury instruction which was not objected to at trial), the manifest injustice arising from such errors was ignored. Moreover, this Court failed to consider or

misunderstood numerous facts and legal arguments that mandate a reversal of the trial court judgment.[6]

II. STATEMENT OF UNDISPUTED FACTS

The abbreviated factual summary in the Memorandum Opinion fails to delineate Kamisugi's complete detachment from the negotiation and execution of the subject DROA which formed the basis for the fraud action against the defendants. In addition, the Memorandum Opinion evidences this Court's confusion between Kamisugi, the individual, and Libbie & Company, the real estate company owned by Kamisugi.

The following undisputed facts highlight the gross injustice arising from the judgment against Kamisugi:[7]

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[6]Kamisugi is hindered in her efforts to identify all of the facts and points of law which were misapprehended or overlooked by this Honorable Court because the opinion was rendered via a Memorandum Opinion which failed to specify the bases for the opinion. Nevertheless, the Memorandum Opinion contains several factual statements which undeniably reflect this Honorable Court's misunderstanding of the most significant points of error raised by Kamisugi.

[7]Kamisugi recognizes that the present motion for reconsideration is not a forum to repeat every fact and point of law raised in the briefs previously submitted to this Court. Accordingly, this memorandum will focus on those matters which

A. RELATIONSHIP BETWEEN THE KUHNERTS, CLYDE ALLISON, LIBBIE & COMPANY AND KAMISUGI.

The Kuhnerts owned the Nuuanu Property from 1979 through June 23, 1983. (Tr. 6/4/90:39). On August 23, 1982, the Kuhnerts entered into an exclusive listing agreement with Libbie & Company for the purpose of selling the Nuuanu Property. (Tr. 5/18/90:156; Tr. 6/4/90:76). Allison executed the exclusive listing agreement for Libbie & Company, which was licensed by the State of Hawaii to engage in the business of real estate sales and brokerage. (R:V1:1; R:V1:27). Kamisugi did not sign the Listing Contract, nor was she identified as the real estate broker on the Listing Contract. (Plaintiffs' Exhibit No. 9).

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this Court apparently overlooked or misapprehended. Kamisugi respectfully incorporates by reference the facts and points of law cited in her opening brief, reply brief, and answering brief (in the cross-appeal) filed with this Court.

B. KAMISUGI WAS NOT INVOLVED WITH THE MARKETING OF THE NUUANU PROPERTY TO THE OSTERMANS.

The record clearly established that Kamisugi did not participate in any of the telephone conversations between Allison and the Ostermans leading up to the Ostermans' inspection of the Nuuanu Property on June 21, 1983. Moreover, it is undisputed that Kamisugi did not attend the Ostermans' inspection of the Nuuanu Property on June 21, 1983. (Tr. 5/16/90:110-121).

Allison's inspection of the Ostermans' penthouse condominium (which was used as part of the transaction with the Kuhnerts) occurred on Wednesday, June 22, 1983. At that time, Allison discussed the estimated value of the Ostermans' penthouse condominium. (Tr. 5/16/90:136-141). It is undisputed that Kamisugi did not inspect the Ostermans' penthouse condominium with Allison,

nor did she provide specific input to the valuation of the condominium. (Tr. 5/16/90:136-141).

C. KAMISUGI WAS NOT INVOLVED WITH THE PREPARATION OF THE DROA.

The signing of the DROA occurred at the meeting between Allison, the Ostermans and the Kuhnerts on June 23, 1983 at the Kuhnerts' Hawaii Kai home. (Tr. 5/16/90:150; Tr. 6/6/90:142). It was at that meeting when Allison prepared the DROA which was signed by Kuhnert and the Ostermans. (Tr. 5/16/90:162). It is undisputed that Kamisugi was not at the June 23, 1983 meeting, and that she did not prepare the DROA for signature by the parties. (Tr. 5/16/90:150-162; Tr. 6/6/90:142).

III. DISCUSSION

A. KAMISUGI'S CHALLENGE TO THE ERRONEOUS SUBMISSION OF THE DEFECTIVE SPECIAL VERDICT WAS CLEARLY MISAPPREHENDED.

The Memorandum Opinion mistakenly states: "Appellant Kamisugi, in her points of error, urges that the trial court erred in submitting the special verdict form to the jury because it was legally incorrect and confusing, and led to **double recovery**." Memorandum Opinion, p. 4. Although there is no question that the Special Verdict was legally incorrect and confusing, Kamisugi never argued that she was the victim of "double recovery."

In her respective appellate briefs, Kamisugi specifically argued that the submission of the Special Verdict was erroneous because: a) the Special Verdict prevented the jury from applying the evidence and law to Kamisugi individually, thereby allowing the jury to assess punitive damages against Kamisugi based on the conduct and financial

status of Libbie & Company; b) the Special Verdict resulted in the assessment of joint and several liability against Kamisugi and Libbie & Company for punitive damages; and c) the Special Verdict allowed the jury to assess punitive damages against Kamisugi based upon vicarious liability for the acts of Libbie & Company. See Kamisugi's Opening Brief, p. 8. Kamisugi's arguments and legal authorities were not touched upon in the Memorandum Opinion.

This Court's misapprehension of Kamisugi's point of error apparently came from its review of the trial court transcripts whereby trial counsel for defendants expressed concern that the Special Verdict allowed the possibility of "double recovery" from Libbie & Company with respect to punitive damages. (Tr. 6/15/90:20-22). The concern was based on the duplicate listing of Libbie & Company on the Special Verdict. Kamisugi did not raise this argument on appeal. Indeed, it would be nonsensical for

Kamisugi to claim "double recovery" since it was Libbie & Company, not Kamisugi, who was listed twice.

This Court's confusion between arguments raised by Kamisugi, the individual, and those related to Libbie & Company, the real estate firm owned by Kamisugi, is significant. Throughout the trial process Kamisugi was prejudiced because she was not viewed independently from Libbie & Company. This Court's own confusion highlights the ongoing injustice incurred by Kamisugi, the individual.

B. THIS COURT FAILED TO PROPERLY APPLY THE PLAIN ERROR DOCTRINE.

The doctrine of "plain error" argued by Kamisugi and cited in the Memorandum Opinion was not fully addressed by this Court. It is widely recognized that a party's failure to make a timely objection at trial will not prohibit an appellate court from taking cognizance of the trial court's error "if the error is plain and may result in a

miscarriage of justice." Turner v. Willis, 59 Haw. 319, 324, 582 P.2d 710, 714 (1978).

As evidenced by the Memorandum Opinion, this Court recognized at least two obvious errors made by the trial court: (a) "the somewhat complicated problems with respect to punitive damages" arising from the Special Verdict; and (b) the submission of the erroneous "conspiracy" instruction to the jury. However, this Court fails to address the second prong of the plain error doctrine - the miscarriage of justice arising from the recognized errors - which mandates a reversal of the judgment against Kamisugi.

The extreme prejudice caused by the Special Verdict cannot be ignored. It is uncontroverted that punitive damages require a finding of "clear and convincing" evidence of wilful and wanton misconduct by the individual assessed with punitive damages. Moreover, the assessment of punitive damages must be based on the consideration of that

individual's conduct and financial resources. Masaki v. General Motors, et al., 71 Haw. 1, 6, 780 P.2d 566, 570 (1989) (in assessing whether an award of punitive damages is appropriate with regard to a particular defendant, it is necessary to focus on actions of that defendant to determine: (1) his mental state; and (2) the nature of his conduct.) Because of the erroneous Special Verdict, Kamisugi was assessed with joint and several liability for punitive damages by a jury which was forced to consider the conduct and financial resources of both Kamisugi and Libbie & Company together. This "joint" assessment of punitive damages is unprecedented.[8] See Kamisugi's Opening Brief, pp. 15-20.

The manifest injustice arising from the erroneous jury instructions, particularly the conspiracy

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[8]As argued by all appellants, punitive damages differ from compensatory damages in that punitive damages are awarded only to punish the wrongdoer. Hence, joint and several liability for punitive damages is inherently inconsistent with the purpose of punitive damages. These reasons for awarding punitive damages make it improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously. See Restatement (Second) of Torts § 909, Comment (b).

instruction, is equally clear. See Kamisugi's Point on Appeal "J". The Memorandum Opinion states that "it is likely that the trial judge, had the instruction been objected to, would have refused it at the time instructions were settled, . . . " Memorandum Opinion, p. 5. This Court attempted to minimize the significance of the error by explaining that "viewing the instructions as a whole, we find no plain error." Memorandum Opinion, p. 5. However, the prejudice arising from the conspiracy instruction goes much further than that recognized by this Court (i.e. one erroneous instruction which could be cured by the remaining instructions). The entire trial proceeding was irreparably tainted by the improper application of a conspiracy theory against Kamisugi.

The miscarriage of justice arising from this "phantom" conspiracy claim is evidenced by the trial judge's stated reliance (twice) on a conspiracy theory where no such claim was ever pled by the Plaintiffs (Tr. 8/29/90:65-66;

Appendix D to Kamisugi's Opening Brief) (Tr. 9/7/90:57; Appendix E to Kamisugi's Opening Brief). During the hearings on the post trial motions, the trial judge stated:

> The Court finds that all though (sic) the question is not an easy one, there was substantial evidence from which the jury could find that the defendants Clyde Allison, Libbie Kamisugi, Darlene and David Osterman conspired together to defraud the plaintiffs. . . (Emphasis added).

See Kamisugi's Appendix D. The trial judge reaffirmed his reliance on a conspiracy theory when ruling on Kamisugi's motion for remittitur:

> Turning to defendant Libbie Kamisugi, this Court finds that there was substantial evidence from which the jury could find that the defendants Clyde Allison, Libbie Kamisugi, Darlene and David Osterman conspired together to defraud plaintiffs. . . (Emphasis added).

See Kamisugi's Appendix E.

It is abundantly clear that the trial judge relied on a conspiracy theory to justify the judgment against Kamisugi individually. Furthermore, it is also clear from the Memorandum Opinion that this Court has relied on circumstantial evidence to justify the judgment against Kamisugi. While Kamisugi agrees with this Court that a conspiracy will most likely be based on circumstantial evidence, there are recognized safeguards to prevent unwarranted claims of conspiracy against innocent parties: (a) the conspiracy must be for an "unlawful purpose"; and (b) the conspiracy must be proven by "clear and convincing" evidence. Doleman v. Meiji Mutual Life Ins. Co., 727 F.2d 1480 (9th Cir. 1984).

Given the recognized errors relating to the Special Verdict and the conspiracy instruction, it is highly probable that the judgment against Kamisugi arose from either (or both) of the following: (a) a conspiracy without an

unlawful purpose[9]; and/or (b) a finding of conspiracy based on a mere preponderance of the evidence.

It is impossible to unweave the prejudice caused by the numerous errors at trial. The confusion and misapplication of law permeated the entire trial proceeding, including the trial judge's analysis of the evidence and the law. Even the most thorough review of the "instructions as a whole" cannot cure the blatant prejudice caused by the improper assertion of a conspiracy claim against Kamisugi.

C. KAMISUGI'S RELATIONSHIP WITH THE RESPECTIVE PARTIES, AND HER LACK OF INVOLVEMENT IN THE SUBJECT TRANSACTION, WERE MISUNDERSTOOD.

This Court misapprehended the scope of Kamisugi's relationship with the respective parties and the

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[9]There is no direct or circumstantial evidence of any wrongdoing by Kamisugi. There is, however, circumstantial evidence that Kamisugi had discussed the subject of the Kuhnert transaction with Allison prior to the signing of DROA. Without the requirement that the conspiracy be for an unlawful purpose, Kamisugi's conversations with Allison could have been viewed by the jury as the basis for a conspiracy.

nature of her involvement with the subject transaction. See Kamisugi's Points on Appeal "B" - "H". In particular, this Court failed to note the following undisputed facts: (a) Libbie & Company had a real estate brokers license separate from the license of Kamisugi (R:V1:1; R:V1:27); (b) Kamisugi did not inspect the Ostermans' penthouse condominium with Clyde Allison (Tr. 5/16/90:136-141); (c) Kamisugi did not provide specific input to the valuation of the Ostermans' penthouse condominium (Tr. 5/16/90:136-140); (d) Kamisugi was not present at the June 23, 1983 meeting when the DROA was executed (Tr. 5/16/90:150-162; Tr. 6/6/90:142); (e) Kamisugi did not prepare the subject DROA for signature by the parties (Tr. 5/16/90:150-162; Tr. 6/6/90:142); and (f) Kamisugi did not review the DROA until the fully executed DROA was presented to her at the Waikiki Yacht Club (Tr. 5/22/90:32-65).

The Memorandum Opinion fails to identify any evidence, whether direct or circumstantial, which could

possibly support the outrageous verdict against Kamisugi.[10] Instead, the Memorandum Opinion merely concludes that "there was abundant circumstantial evidence to support a verdict of fraud." (Emphasis added). Memorandum Opinion, p.4. This reference to "circumstantial" evidence parallels the trial court's determination that Kamisugi's liability could be justified because of the existence of a "conspiracy." It is unprecedented that punitive damages be imposed on an individual based merely upon circumstantial evidence, absent "clear and convincing" evidence of wilful and wanton misconduct by that individual.

This absence of direct evidence of Kamisugi's involvement in the alleged fraud, together with the obvious errors previously recognized by this Court, add up to a gross miscarriage of justice as to Kamisugi.

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[10]As a result of this Court's reluctance to specify the evidence supporting the punitive damage award against Kamisugi, to this day she does not know what, if any, wrong she committed.

D. THE IMPOSITION OF PUNITIVE DAMAGES AGAINST KAMISUGI, UNDER THE CIRCUMSTANCES OF THIS CASE, DEPRIVES KAMISUGI OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF BOTH THE UNITED STATES AND HAWAII CONSTITUTIONS.

Both the United States and Hawaii Constitutions speczifically prohibit the state from "depriv[ing] any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, Sec. 1; see also Hawaii Const. art. I, Sec. 5. Under the circumstances of this case, the award of punitive damages, jointly and severally, against Kamisugi and Libbie & Company clearly deprives Kamisugi of property without due process of law in violation of the federal and state constitutions.

The United States Supreme Court recently has held that an award of punitive damage violates the Due Process Clause of the Fourteenth Amendment unless procedural protections adequately guide and control the

discretion of the jury in fashioning the award. See Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. __, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); see also Eichenseer v. Reserve Life Insurance Co., 934 F.2d 1377 (5th Cir. 1991) (award of punitive damages unconstitutional unless reasonable procedural safeguards control discretion of jury). Although the Haslip Court ultimately rejected the due process challenge to an award of punitive damages, the Court explicitly noted that under certain circumstances an award of punitive damages may "cross the line into the area of constitutional impropriety." Id. at __, 111 S.Ct. at 1046, 113 L.Ed.2d at 23.

More importantly, the Court eschewed a formal due process standard:

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say,

> however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.

Id. at __, 111 S.Ct. at 1043, 113 L.Ed.2d at 20 (emphasis added).

The Court reasoned that unlimited discretion in the fashioning of an award of punitive damages invites "extreme results that jar one's constitutional sensibilities." Id. at __, 111 S.Ct. at 1043, 113 L.Ed.2d at 20. Accordingly, the Court concluded that an award of punitive damages violates the Due Process Clause unless procedural protections adequately control the discretion of the jury to fashion a punitive damage award.

In this case, the trial court clearly failed adequately to guide the jury in determining punitive damages. Although the jury instructions may have provided adequate guidance for the jury's determination of punitive damages,

these instructions were thwarted by the Special Verdict form, which set out a clearly erroneous framework for the imposition of punitive damages. More specifically, the Special Verdict form allowed the jury to award punitive damages against Kamisugi without a specific determination that Kamisugi, individually, had acted in a manner warranting the imposition of punitive damages. The Special Verdict form absolutely permitted the jury to assess punitive damages against Kamisugi based on the conduct of Libbie & Company. Moreover, in the event the jury found that Libbie & Company's conduct warranted punitive damages, the Special Verdict form required the jury to also impose punitive damages upon Kamisugi. Such an extreme and arbitrary imposition of punitive damages violates all notions of fundamental fairness and certainly, under Haslip, is unreasonable.

Furthermore, the imposition of liability for punitive damages, jointly, on Kamisugi and Libbie &

Company as required by the Special Verdict form is inherently unfair, implicating Fourteenth Amendment due process concerns. In Haslip, the Court specifically found that the Alabama court's instructions regarding the purpose and imposition of punitive damages "accommodated [defendant's] interest in rational decisionmaking and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution." Haslip, 499 U.S. at __, 111 S.Ct. at 1044, 113 L.Ed.2d at 21 (emphasis added).

In this case, the joint punitive liability imposed by the Special Verdict form prevented the jury from any "meaningful individualized assessment" of the punitive damages to be awarded. Imposing punitive damages jointly creates an extreme result by assessing liability for punitive damages on Kamisugi for the acts of Libbie & Company.

In addition to the lack of judicial guidance on punitive damages, the jury was erroneously allowed to

cumulate the financial conditions of both Kamisugi and Libbie & Company in determining the amount of punitive damages attributable to Kamisugi. The United States Supreme Court has specifically recognized that "there is no justice in allowing the recovery of punitive damages, in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants[.]" Washington Gaslight Co. v. Landsen, 172 U.S. 534, 19 S.Ct. 296, 43 L.Ed. 543 (1899); see also Adams v. Murakami, 813 P.2d 1348 (Cal. 1991) (constitution weighs strongly in favor of requiring defendant's financial condition so as to assist in determining whether punitive damages are excessive). Without proper guidance from the court, the jury clearly enjoyed the unchecked type of discretion in assessing the amount of punitive damages which the Haslip Court expressly found to "cross the line into the area of constitutional impropriety."

Haslip, 499 U.S. at __, 111 S.Ct. at 1046, 113 L.Ed.2d at 23.

Even if this Court sincerely believes that the Special Verdict adequately guided the jury in assessing punitive damages, the trial court obviously did not agree. The trial judge candidly acknowledged problems with the Special Verdict and attempted, sua sponte to correct the jury's Special Verdict form by converting the jury's finding of joint punitive liability against Kamisugi and Libbie & Company to a judgment of joint and several punitive liability against the two defendants.[11] This attempt, however, failed to remedy the obvious error, and in fact compounded the problem.[12] The imposition of joint and several liability for

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[11]In acknowledging the inherent problems in the Special Verdict, the trial judge also, sua sponte, converted the jury's finding of joint punitive liability on the part of Allison and Libbie & Company to a judgment of punitive liability against Allison only.

[12]The Special Verdict, which was filed on June 19, 1990, provided that "Libbie Kamisugi and Libbie & Company, Inc." should be assessed with punitive damages. (R:V6:1). The Judgment was entered on August 7, 1990, and provided for punitive damages "[a]gainst Defendant Marion Libbie Kamisugi and/or Defendant Libbie & Company, Inc." (R:V6:221). The First Amended

punitive damages is unprecedented and constitutionally unreasonable.

As discussed above, to satisfy constitutional due process requirements, punitive damages must be reasonable and must be assessed with adequate constraints on the discretion of the factfinder imposing the award. Haslip, 499 U.S. at __, 111 S.Ct. at 1043, 113 L.Ed.2d at 20. In this case, the court's sua sponte imposition of joint and several liability for punitive damages clearly offends constitutional due process required by Haslip. The law in Hawaii absolutely does not permit Kamisugi to be held liable for the punitive damages imposed upon Libbie & Company, a separate and distinct entity. See Lauer v. Young Men's Christian Association of Honolulu, 57 Haw. 390, 557 P.2d 1334 (1976) (punitive damages must be placed squarely on

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Judgment entered on October 18, 1990, similarly provided for punitive damages against "Defendant Marion Libbie Kamisugi and/or Defendant Libbie & Company, Inc." (R:V7:109).

Thus, Kamisugi's joint liability for punitive damages was changed to joint and several liability.

the shoulders of the wrongdoer). The trial court's action in imposing joint and several liability therefore is completely unreasonable and demonstrates, in this case, the court's unbridled discretion in fashioning punitive damage awards. Such unchecked discretion in imposing punitive damages clearly is contrary to the due process requirements as stated in by the Court in Haslip. Under the circumstances of this case, the court's sua sponte imposition of joint and several liability for punitive damages is fundamentally unfair and clearly violates Kamisugi's constitutional due process rights.

IV. CONCLUSION

Based on the foregoing, and the points and authorities previously set forth in her appellate briefs, Kamisugi respectfully requests that this Honorable Court

reconsider its Memorandum Opinion affirming the judgment against her and grant her request for a new trial.

DATED: Honolulu, Hawaii, March 23, 1992.

/s/ John Y. Yamano
WILLIAM C. McCORRISTON
JERROLD Y. CHUN
JOHN Y. YAMANO
Attorneys for Defendant-Appellant
MARION LIBBIE KAMISUGI

NO. 14956

IN THE SUPREME COURT OF THE
STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT, Plaintiffs-Appellees, Cross-Appellants, vs. CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation; MARION LIBBIE KAMISUGI; DARLENE M. OSTERMAN; HERBERT DAVID OSTERMAN, John Doe 1-5, Doe Corporations 1-5, Doe Partnerships 1-5, and Doe Governmental Entity 1-5, Defendants-Apellant.	CIV. NO. 88-3197 APPEAL FROM THE (1) JUDGMENT ENTERED ON AUGUST 7, 1990; (2) "FIRST AMENDED JUDGMENT" ENTERED ON OCTOBER 18, 1990; (3) "ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST FILED ON SEPTEMBER 6, 1990," ENTERED ON OCTOBER 8, 1990; (4) "ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT CLYDE H. ALLISON, LIBBIE & COMPANY, INC., DARLENE M. OSTERMAN AND

) HERBERT DAVID
) OSTERMAN'S
) MOTION FOR JUDG-
) MENT NOTWITH-
) STANDING THE
) VERDICT OR, IN
) THE ALTERNATIVE
) FOR NEW TRIAL OR
) REMITTITUR FILED
) JULY 27, 1990;
) DEFENDANTS
) CLYDE H. ALLISON,
) LIBBIE & COMPANY,
) INC., DARLENE
) OSTERMAN AND
) HERBERT DAVID
) OSTERMAN'S
) SUPPLEMENTAL
) MEMORANDUM IN
) SUPPORT OF THEIR
) MOTION FILED
) JULY 27, 1990, FILED
) ON AUGUST 20,
) 1990;
) SUPPLEMENTAL
) AFFIDAVIT OF JOHN
) HOUK IN SUPPORT
) OF DEFENDANTS'
) MOTION FILED
) JULY 27, 1990, FILED
) ON SEPTEMBER 6,
) 1990;
)
)

) AND DEFENDANT
) MARION LIBBIE
) KAMISUGI'S
) MOTION FOR
) JUDGMENT
) NOTWITHSTANDING
) THE VERDICT
) RENDERED ON JUNE
) 19, 1990, OR IN THE
) ALTERNATIVE FOR
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) REMITTITUR FILED
) ON JULY 27, 1990;
) DEFENDANT
) MARION LIBBIE
) KAMISUGI'S
) AMENDED MOTION
) FILED ON
) AUGUST 20, 1990;
) DEFENDANT
) MARION LIBBIE
) KAMISUGI'S
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) MEMORANDUM IN
) SUPPORT OF
) DEFENDANT
) MARION LIBBIE
) KAMISUGI'S
) AMENDED MOTION
) FILED ON
) AUGUST 20, 1990,
) FILED ON
) AUGUST 27, 1990;
)

) DEFENDANT
) MARION LIBBIE
) KAMISUGI'S
) SECOND
) SUPPLEMENTAL
) MEMORANDUM IN
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) DEFENDANT
) MARION LIBBIE
) KAMISUGI'S
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) FILED ON
) AUGUST 20, 1990,
) FILED ON
) SEPTEMBER 6, 1990"
) ENTERED ON
) OCTOBER 18, 1990;
) and (5) "FIRST
) AMENDED NOTICE
) OF TAXATION OF
) COSTS; BILL OF
) COSTS" FILED ON
) SEPTEMBER 20, 1990
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)
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)	FIRST CIRCUIT
)	COURT
)	
)	HONORABLE
)	LELAND H.
)	SPENCER
)	
)	HONORABLE
)	ROBERT G. KLEIN
)	
)	HONORABLE
)	PHILIP T. CHUN
)	

CERTIFICATE OF GOOD FAITH

I hereby certify, as one of the attorneys for Appellant MARION LIBBIE KAMISUGI, that the foregoing Motion for Reconsideration is presented in good faith and not for purposes of delay.

DATED: Honolulu, Hawaii, March 23, 1992.

/s/ John Y. Yamano
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NO. 14956

IN THE SUPREME COURT OF THE
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HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT, Plaintiffs-Appellees, Cross-Appellants, vs. CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation; MARION LIBBIE KAMISUGI; DARLENE M. OSTERMAN; HERBERT DAVID OSTERMAN, John Doe 1-5, Doe Corporations 1-5, Doe Partnerships 1-5, and Doe Governmental Entity 1-5, Defendants-Apellant.	CIV. NO. 88-3197 APPEAL FROM THE (1) JUDGMENT ENTERED ON AUGUST 7, 1990; (2) "FIRST AMENDED JUDGMENT" ENTERED ON OCTOBER 18, 1990; (3) "ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST FILED ON SEPTEMBER 6, 1990," ENTERED ON OCTOBER 8, 1990; (4) "ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT CLYDE H. ALLISON, LIBBIE & COMPANY, INC., DARLENE M. OSTERMAN AND

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) DEFENDANT
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)	SPENCER
)	
)	HONORABLE
)	ROBERT G. KLEIN
)	
)	HONORABLE
)	PHILIP T. CHUN
)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing motion will be served on the above-identified parties at their respective addresses by means of hand delivery.

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DATED: Honolulu, Hawaii, March 23, 1992.

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Attorneys for Defendant-
Appellant
MARION LIBBIE KAMISUGI

APPENDIX D

NO. 14956

IN THE SUPREME COURT OF THE STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT, Plaintiffs-Appellees, Cross-Appellants, vs. CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation; MARION LIBBIE KAMISUGI; DARLENE M. OSTERMAN; HERBERT DAVID OSTERMAN, Defendants-Appellants, Cross-Appellees, and JOHN DOE 1-5, DOE CORPORATIONS 1-5, DOE PARTNERSHIPS 1-5, AND DOE GOVERNMENTAL ENTITY 1-5, Defendants.	) CIV. NO. 88-3197)) APPEAL FROM) THE)) 1) JUDGMENT,) FILED AUGUST 7,) 1990;) 2) ORDER) GRANTING IN) PART AND) DENYING IN PART) PLINTIFFS') MOTION FOR) PREJUDGMENT) INTEREST FILED) ON SEPTEMBER 6,) 1990;) 3) FIRST) AMENDED) NOTICE OF) TAXATION OF) COSTS; BILL OF) COSTS; AFFI-) DAVIT OF) GERALD H.) KURASHIMA;) EXHIBIT "A";

) CERTIFICATE OF
) SERVICE, FILED
) SEPTEMBER 20,
) 1990; and
) 4) ORDER
) DENYING
) DEFENDANTS'
) MOTION FOR
) PARTIAL
) SUMMARY
) JUDGMENT ON
) THE ISSUE OF
) FRAUD FILED ON
) APRIL 9, 1990,
) FILED MAY 21,
) 1990
)
) APPEAL AND
) CROSS-APPEAL
) FROM THE:
)
) 1) FIRST
) AMENDED
) JUDGMENT,
) FILED OCTOBER
) 18, 1990, and
) 2) ORDER
) DENYING IN PART
) AND GRANTING
) IN PART DEFEN-
) DANT CLYDE H.
) ALLISON, LIBBIE
) & COMPANY,
)

) INC., DARLENE
) M. OSTERMAN
) AND HERBERT
) DAVID
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) JUDGMENT
) NOTWITH-
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) DANTS CLYDE H.
) ALLISON, LIBBIE
) & COMPANY,
) INC., DARLENE
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) OSTERMAN'S
) SUPPLEMENTAL
) MEMORANDUM
) IN SUPPORT OF
) THEIR MOTION
)
) [MEMORANDUM
) OPINON]
)
) FILED 7/27/90,
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) AUGUST 20, 1990;

) SUPPLEMENTAL
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) JOHN HOUK IN
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) MOTION FILED
) 7/27/90, FILED ON
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) ON AUGUST 20,
) 1990, FILED ON
) SEPTEMBER 6,
) 1990, FILED
)

) OCTOBER 18, 1990
)
) FIRST CIRCUIT
) COURT
_____)

MEMORANDUM OPINION

This is an appeal by Clyde H. Allison (Allison), Libbie & Company, Inc., Marion Libbie Kamisugi (Kamisugi), and Darlene M. Osterman and Herbert David Osterman (Ostermans) from a judgment for damages and punitive damages, in what is essentially a fraud action, brought against them by Heinz W. Kuhnert and Sherilyn Marie Kuhnert (Kuhnerts). The Kuhnerts cross-appeal from the order of remittitur of a portion of the punitive damages found by the jury. We affirm.

In 1983, the Kuhnerts engaged Libbie & Company, a real estate firm, whose principal and broker was Kamisugi, and one of whose salesman was Allison, to handle the sale of their Nuuanu home. They wanted a cash transaction. Eventually they entered into a DROA and a sale with the

Ostermans, where they received part cash, and the Ostermans' condominium apartment, pursuant to representations that it had a value vastly in excess of the value which it in fact had. When the inflation was discovered, this suit was brought.

The claim was made that Mrs. Osterman was herself engaged in the real estate business, that the Ostermans knew that the value was inflated, that Allison knew that the value was inflated, that Kamisugi knew that the value was inflated, that Libbie & Company therefore knew that the value was inflated, and that the transaction constituted intentional fraud for which compensatory and punitive damages were pale. The Ostermans filed counterclaims for fraud against the Kuhnerts and the case was eventually tried to a jury which returned a verdict for the Kuhnerts, against all the appellants, assessing both compensatory and punitive damages. The judge below, on a motion for new trial, remitted some of both the compensatory and punitive damages, and granted a

new trial unless the Kuhnerts accepted the remittitur. They did, but the appellants brought this appeal anyway. The Kuhnerts then cross-appealed, urging that the remittitur of punitive damages was improper.

Appellant Kamisugi, in her points of error, urges that the trial court erred in submitting the special verdict form to the jury because it was legally incorrect and confusing, and led to double recovery. Appellant did not raise the objections, now raised to the verdict form, at trial, and so must rely upon a claim of plain error. Given the discussion held at the time that the jury form was proposed, and the somewhat complicated problems with respect to punitive damages, arising out of the facts of this case, we see no plain error.

Appellant's second, third, fourth, fifth, sixth, seventh and eighth points go to claims that, in effect, various aspects of her responsibility for the fraud were not established by the applicable standards with respect to the burden of proof.

Our review of the evidence indicates to us that the jury was justified in finding clear and convincing evidence of her participation in the fraud, and thus that it was proper to deny her motions for directed verdict, for judgment notwithstanding the verdict, insofar as the directed verdict motion may have preserved that point and her motion for new trial.

Fraud, by its nature, is seldom proved by confession of the persons participating in it. It is usually proved by circumstantial evidence. In our view, there was abundant circumstantial evidence to support a verdict of fraud whether the standard be clear and convincing evidence, as appellant urges in some of her points, or merely substantial evidence as she urges in others.

Appellant Kamisugi in her points of error, urges that the trial court erred in submitting the special verdict form to the jury because it was legally incorrect and confusing, and led to double recovery. Appellant did not raise the

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Fraud, by its nature, is seldom proved by confession of the persons participating in it. It is usually proved by circumstantial evidence. In our view, there was abundant circumstantial evidence to support a verdict of fraud whether the standard be clear and convincing evidence, as appellant urges in some of her points, or merely substantial evidence as she urges in others.

Appellant complains that the court below erred in granting the motion for prejudgment interest. Prejudgment interest is a matter normally left within the discretion of the trial court. We find no abuse of discretion, or violation of statute in this case.

Appellant also urges error in the giving of what she denominates a conspiracy instruction, but that instruction was not objected to.

In a normal trial, instructions are considered and argued individually before the trial judge. But, on review, the instructions, as given, must be viewed as a whole.

Therefore, while it is likely that the trial judge, had the instruction been objected to, would have refused it at the time instructions were settled, nevertheless, viewing the instructions as a whole, we find no plain error.

Appellant claims plain error in the giving of an instruction on fiduciary duty, which she says, when read together with the special verdict form, would lead the jury to believe that a breach of fiduciary duty by one defendant would make all the defendants liable therefor. Again, neither the instruction nor the special verdict form were objected to on these grounds, and we see no plain error.

Finally, appellant urges that denying a remittitur of the commission of $78,000 paid on the fraudulent transaction and the remaining punitive damages award against her were error. We do not agree.

Appellants Allison and Libbie & Company urge plain error in the giving of the two instructions discussed above and in the giving of the special verdict form. We reject

these contentions for the same reasons we rejected them with respect to appellant Kamisugi.

These appellants also urge there is insufficient evidence of fraud, and that therefore their motion for a new trial should be granted. There was clear evidence of fraud. They also object to the denial of a full remittitur of damages against them and in the granting of prejudgment interest. We find no error.

Appellant Ostermans urge error in finding them liable for fraud and for general damages. On the record, there was ample evidence to support both findings by the jury.

These appellants also urge error in allowing Mr. Kuhnert to testify as to the evidence of Mrs. Kuhnert's emotional distress. We find no error. They urge in addition, that the jury erred in finding them liable for punitive damages, in denying their motions for directed verdict, for judgment notwithstanding the verdict, for denying their motion for a new trial, in granting the motion

for remittitur of punitive damages only in part, and in giving the so-called conspiracy instruction. We find no error. There was ample evidence of the participation of both of the Ostermans in the fraud, ample evidence to support a finding of punitive damages, and ample reason to deny their various motions.

Appellants urge error in admitting evidence on the listing price of the property in 1989 and other evidence with respect to the same matter. We think such evidence was relevant in the circumstances of this case.

Appellants also urge error in the awarding of prejudgment interest. What we have said previously applies to their appeal also.

Appellants also urge error in denying a cross-examination of appellee Mr. Kuhnert as to his experience in real estate. We find no abuse of discretion in that limitation of cross-examination.

Finally, as to the cross-appeal on the remittitur, remittitur is normally a matter within the discretion of the trial court and, in the circumstances of this case, we see no abuse of discretion. Judgment affirmed.

DATED: Honolulu, Hawaii, March 13, 1992.

Lyle M. Ishida
(Paul A. Lynch with
him on the briefs;
Case & Lynch) for
Ostermans

Lloyd J. Hochberg Jr.
(James A. Wagner
with him on the
briefs; Wagner &
Wagner, of counsel)
for Allison and
Libbie & Company

William C. McCorriston
(Jerrold Y. Chun and
John Y. Yamano with
him on the briefs;
McCorriston, Miho &
Miller) for Kamisugi

Ronald C.S. Au
(Gerald H. Kurashima
and Connie G.W.
Meredith with him
on the briefs)
for Kuhnerts

APPENDIX E

RONALD G. S. AU #599-0
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1120 Pacific Tower
1001 Bishop Street
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Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT, Plaintiffs, vs. CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation; MARION LIBBIE KAMISUGI; DARLENE M. OSTERMAN; HERBERT DAVID OSTERMAN, JOHN DOE 1-5, DOE CORPORATION 1-5, DOE PARTNERSHIP 1-5, and ROE GOVERNMENTAL ENTITY 1-5, Defendants,	CIV. NO. 88-3197-10 (CONTRACT) FIRST AMENDED JUDGMENT TRIAL: Commenced May 10, 1990 JUDGE: Hon. Leland H. Spencer

FIRST AMENDED JUDGMENT

Pursuant to the Special Verdict returned by the jury on June 19, 1990, after trial and hearing on August 27, 28, 29, 1990 and September 7, 12, 1990, with Ronald G. S. Au and Gerald H. Kurashima appearing for Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert; Paul A. Lynch appearing for Defendants Clyde H. Allison, Libbie & Company, Inc., Darlene M. Osterman and Herbert David Osterman; and William C. McCorriston and Jerrold Y. Chun appearing for Defendant Marion Libbie Kamisugi, this Court enters a First Amended Judgment for the Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert as follows:

APPENDIX C

SPECIAL DAMAGES

1. Against Defendants Clyde H. Allison, Libbie & Company, Inc., a Hawaii Corporation, Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman,

jointly and severally, Special Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum or Three Hundred Twenty-Five Thousand and no/100 Dollars ($325,000.00).

2. Against Defendants Clyde H. Allison, Marion Libbie Kamisugi and Libbie & Company, Inc., a Hawaii Corporation, jointly and severally, Special Damages to the Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of Seventy-Eight Thousand and no/100ths Dollars ($78,000.00).

GENERAL DAMAGES

1. Against Defendants Clyde H. Allison, Libbie & Company, Inc., a Hawaii Corporation, Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman, jointly and severally, General Damages to

Plaintiff Heinz W. Kuhnert in the sum of Twenty Thousand and no/100ths Dollars ($20,000.00);

2. Against Defendants Clyde H. Allison, Libbie & Company, Inc., a Hawaii Corporation, Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman, jointly and severally, General Damages to Plaintiff Sherilyn Marie Kuhnert in the sum of Ten Thousand and no/100ths Dollars ($10,000.00).

PUNITIVE DAMAGES

1. Against Defendant Clyde H. Allison, Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of Two Hundred Thousand and no/100ths Dollars ($200,000.00).

2. Against Defendant Marion Libbie Kamisugi and/or Defendant Libbie & Company, Inc., Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of Two Hundred Ninety-Three Thousand and no/100ths Dollars ($293,000.00). The cumulative amount of punitive damages owed by Defendant Marion Libbie Kamisugi and Libbie & Company, Inc., is $293,000.00. Payment by either Defendant shall reduce the principal sum owed.

3. Against Defendant Darlene M. Osterman, Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of One Hundred Twenty-Five Thousand and no/100ths Dollars ($125,000.00).

PREJUDGMENT INTEREST

1. Against Defendants Clyde H. Allison, Libbie & Company, Inc., Darlene M. Osterman, Herbert David Osterman and Marion Libbie Kamisugi, jointly and severally, prejudgment interest at the statutory rate of ten percent (10%) per year on Special Damages of Three Hundred Twenty-Five Thousand and no/100ths Dollars ($325,000.00), commencing from the date August 1, 1985, and continuing until entry of the First Amended Judgment.

2. Against Defendants Clyde H. Allison, Libbie & Company, Inc., and Marion Libbie Kamisugi, jointly and severally, prejudgment interest at the statutory rate of ten percent (10%) per year on the Special Damages of Seventy-eight Thousand and no/100ths Dollars ($78,000.00); as follows: Prejudgment interest

on Fifty Thousand and no/100ths Dollars ($50,000.00) commencing from August 1, 1983 and continuing until entry of the First Amended Judgment; and on Twenty-Eight Thousand and no/100ths Dollars ($28,000.00) commencing from August 1, 1984, and continuing until entry of the First Amended Judgment.

Pursuant to the Special Verdict returned by the jury, the Court also enters judgment in favor of the Plaintiffs on Defendant Herbert David Osterman and Darlene M. Osterman's Counterclaim. There were no other named Defendants.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiffs shall have judgment on the Complaint in the amount of damages as stated herein, post judgment interest and their reasonable costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Plaintiffs shall have judgment on the Counterclaim and their reasonable costs.

Dated: Honolulu, Hawaii, October 16, 1990.

/s/ Leland H. Spencer
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/ Caroline P. Egli
PAUL A. LYNCH
CAROLYN P. EGLI
Attorneys for Defendants
Clyde H. Allison, Libbie
& Company, Inc.,
Darlene M. Osterman and
Herbert David Osterman

/s/ Jerrold Y. Chun
WILLIAM C. MCCORRISTON
JERROLD Y. CHUN
Attorneys for Defendant
-Marion Libbie Kamisugi

APPENDIX F

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

THE STATE OF HAWAII

HEINZ W. KUHNERT, et al.	)	CIVIL NO. 88-3197
	)	
Plaintiffs.	)	
	)	
vs.	)	
	)	
CLYDE H. ALLISON, et al.	)	
	)	
Defendants.	)	
	)	

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Had Before The Honorable LELAND SPENCER, Third Division, on Friday, September 7, 1990, on FURTHER HEARING ON KAMISUGI'S MOTION FOR REMITTITUR and on THE OSTERMANS' MOTION FOR REMITTITUR.

APPEARANCES:

For the Plaintiff: RONALD G. S. AU, ESQ.
GERALD H. KURASHIMA, ESQ.

For the Defendants: PAUL A. LYNCH, ESQ.
WM. MC CORRISTON, ESQ.
JERROLD CHUN, ESQ.

REPORTED BY: Ann Kilroy, CSR #144
Official Reporter

And if you look at Kono's affidavit it's even less.

THE COURT: Thank you. I have heard from all the parties now. I will take a recess and then I am going to see if I can't come back in about twenty minutes with a ruling in this case.

Court is in recess.

(Recess taken.)

THE COURT: Let the record reflect the presence of counsel.

I have a head cold, so if I have difficulty enunciating my words, counsel will understand. And if you don't understand something I say, just tell me and I will try to repeat it more clearly.

Turning to compensatory damages, the Court finds that $78,000 is the amount of the commission which plaintiffs paid and are entitled to receive back by reason of a breach of fiduciary duty on the part of defendants Libbie and Company, Clyde Allison and Libbie Kamisugi, even if such sum is over and above the recovery of damages sufficient to make the plaintiffs otherwise whole. However, the Court finds that the sum was improperly assessed against Darlene and David Osterman and will order a remittitur in that amount to those defendants. That's finding number one.

Two, the Court finds that the award of $325,000 as an item of compensatory damages included damages for the missing furnishings. The Court further finds that the jury improperly awarded $42,000 for the missing furnishings over and above the $325,000 and that the defendants are entitled to a remittitur of $42,000 as to compensatory damages.

Three, the Court finds that it erroneously permitted the issue of interest to be tried as an item of damages at trial

over the objection of the defendants and that the jury awarded $53,625 as damages on this item, and the Court will grant a remittitur of compensatory damages in this amount.

In all other respects the Court will deny request for remittitur as to compensatory damages.

Turning to punitive damages. As to the defendant Clyde Allison the Court finds that there is no evidence in the record concerning Clyde Allison's financial condition. Although the Court feels that the absence of evidence does not permit the Court to withhold the submission of the issue from the jury, the Court feels that it is a factor for the Court to consider in a hearing such as this on the issue of remittitur. The Court particularly feels that this is so when punitive damages have been returned by a jury in excess of compensatory damages. The Court finds that the punitive damages against Clyde Allison are excessive and a result of passion and that there should be a remittitur of $300,000,

leaving a balance of $200,000 as punitive damages against Clyde Allison.

Turning to defendant Libbie Kamisugi, this Court finds that there was substantial evidence from which the jury could find that the defendants Clyde Allison, Libbie Kamisugi, Darlene and David Osterman conspired together to defraud plaintiffs to accept a value of accepting a value of $950,000 on the penthouse apartment by falsely representing the defendants' own state of mind that the apartment had a market value of $1 million and could be sold for $950,000 during the two year term of the agreement of sale. The Court stated this finding in giving its ruling, that is in denying the motion for new trial, or the judgment notwithstanding the verdict at the last hearing. However, there is no evidence that Libbie Kamisugi played a leading or active role in the conspiracy. And bearing in mind the evidence of Libbie Kamisugi's financial condition the Court nonetheless finds that the punitive damages of $1,465,000 are

grossly excessive and a result of passion. The Court will order remittitur of four-fifths of that amount, or $1,172,000, leaving a balance of $293,000 punitive damages against Libbie Kamisugi.

Turning next to David Osterman, the Court finds from the affidavit of David Osterman that he is permanently physically and mentally disabled and deprived of earning power. The Court finds from the evidence adduced at trial that he is insolvent. That is actually more accurately stated that he has a negative net worth. And the Court is searching for the proper legal basis upon which to set aside the punitive damage award under the circumstances. A remittitur does not entitle the Court to, as I understand it, simply eliminate a punitive damages award. I can grant Mr. Osterman a new trial on the issue of punitive damages, which is a reconsideration of what I did previously at our last hearing. I can grant him a remittitur of all but $1,000.

Plaintiff on each item of remittitur that I grant today is given the alternative of a new trial.

Those are the two procedural ways the Court feels it can go. What I would like to do is -- well, I frankly don't know which way to go.

Mr. Lynch, do you have any input?

MR. LYNCH: Not at this point, Your Honor. If I could reserve that until we come back next week?

THE COURT: Well, I want to issue a final order. I think what I am going to do is order or grant a new trial as to David Osterman on the issue of punitive damages. And this is really a reconsideration of the denial of the new trial that I made last week or the week before. And if Mr. Au objects to being cut off guard on this, I will grant a further hearing and give Mr. Au a further opportunity to argue the issue. But absent an objection, that will be my order

So Mr. Lynch, you will draft an order that will grant Mr. Osterman a new trial on the issue of punitive damages.

MR. LYNCH: Yes, Your Honor. Just to make sure that the record is clear, you stated at the beginning of your finding with respect to Mr. Osterman based upon his affidavit you find him permanently disabled. I just wanted to make it clear it's his doctor's affidavit.

THE COURT: Very well. Now, in all other respects Mr. Au will be drafting the orders in connection with the denial of new trials as to the other defendants and the denial of judgments notwithstanding the verdicts.

MR. AU: May I ask a question on that?

THE COURT: Yes.

MR. AU: Then do I understand the Court's order Mr. Lynch will be drafting as to new trial as to David Osterman limited to the issue of whether or not punitive damages should be assessed against him?

THE COURT: Correct.

MR. AU: Thank you.

THE COURT: Turning next to Darlene Osterman, the Court finds that at the time of trial Darlene Osterman had a negative net worth. Under these circumstances the Court finds that the punitive damages assessed against Darlene Osterman was excessive and based on passion, and the Court will grant a remittitur of $125,000, leaving a balance of $125,000 punitive damages as an award in favor of plaintiff and against Darlene Osterman.

In each respect in which the Court has granted remittitur the plaintiff is granted the right of a new trial. I think I have covered each of the issues we are reporting today.

MR. LYNCH: Your Honor, I think we need to address punitive damages with respect to Libbie and Company.

THE COURT: All right. I had ruled during the trial that because the Court had determined as a matter of law that Both Libbie Kamisugi and Clyde Allison were hierarchy of

Libbie and Company, Libbie Kamisugi being the owner and president and Clyde Allison being the vice president and general manager, I believe, that Libbie and Company was vicariously responsible not simply for compensatory damages but for punitive damages as well. More accurately stated Libbie and Company was responsible for the acts of Clyde Allison and Libbie and Company because their acts were the management of Libbie and Company. I don't think it's accurate to say Libbie and Company was vicariously responsible but rather their acts were the acts of Libbie and Company because of the status they held within the company, that is the position they held within the company. The Court was then faced with Libbie and Company being held liable for two separate punitive damages awards, which the Court felt was unfair and to which the defendant objected and the Court agreed. The Court accordingly held that it would hold Libbie and Company liable for the greater of the two punitive damages awards and not for both punitive damage

awards. The award against Libbie Kamisugi was of course the greater of the two awards prior to the hearing today and even after the hearing today remains the greater of the two awards.

Based on the remittitur the punitive damage award assessed against Libbie Kamisugi is $293,000. And that will be the judgment assessed against the Company as well for punitive damages.

MR. AU: Do I understand the Court is remaining untouched the emotional distress as to Heinz and Shirley?

THE COURT: Correct. What the Court has not ruled on the Court denies as far as requests for remittitur are concerned.

MR. AU: Finally, Your Honor, I would ask the Court with respect to the issue of David Osterman again, so there is no confusion, there would be a final judgment then as to the finding of the jury on the compensatory damages on everything but punitive damages, and that would be the issue

of the new trial. But there would be a final judgment on everything else as to David Osterman. Am I correct, Your Honor?

THE COURT: Yes, as to compensatory damages David Osterman is responsible together with all other parties. I have denied the motion for new trial. I have denied the judgment notwithstanding the verdict. And my rulings today on compensatory damages are just as I have stated.

MR. AU: Very well, Your Honor. I understand.

THE COURT: But I am, as I indicated before, a little bit unsure as to procedurally how to proceed with David Osterman. Here is a man that is permanently and physically and mentally disabled and has no earning power and based on the evidence before the Court has no -- that is, has a negative -- that is, is insolvent. And I hesitate to grant a remittitur that leaves even $1,000 punitive damages against a man that -- under those circumstances. So the only thing I could think of to do is to grant a new trial.

MR. LYNCH: One question, Your Honor. The basis -- I understand the basis on which the Court is awarding a remittitur and punitive damages of $283,000 against Libbie and Company and the same amount against Libbie Kamisugi. My question is is that joint and several.

THE COURT: The judgment presently is joint and several. By that I mean -- wait a minute.

MR. MC CORRISTON: The Court is correct. The judgment is currently joint and several.

MR. LYNCH: I am just addressing myself to the notion whether the payment of one or the other of that sum automatically relieves the other.

THE COURT: Correct. I understand the point. Mr. Au, what is your input on that?

MR. AU: Well, I would accept any suggestion by defense counsel. Because I don't want to, very candidly, have basis for error, recognizing this is one of the points they raised. I don't want me to say something and it turns

out to be error on appeal. That's why. So I can see them by committing to a joint and several -- it's my understanding that the jury found each individually liable based upon the jury instructions and therefore since they were both liable both found individually liable the Court picked the higher assessment of the two as against the corporation. Now, in terms of paying the judgment, while it may read joint and several, it's my understanding that to the extent that any one of them pays the judgment it would reduce it proportionately as to the other. That's my understanding. But to just profoundly say it was a joint and several judgment, I can't agree. Because I think the Court's thinking is behind that judgment, Your Honor, which the Court has explained many times. But I do agree with Mr. Lynch that to the extent one pays the other is reduced proportionately, I do agree with that.

MR. LYNCH: I suggest we just leave it alone.

THE COURT: I tell you frankly on the record what

concerns me is as I look back over this the person who suffers the smaller punitive damage award does not have the benefit -- I was going to say the benefit of the corporation helping them pay it. But of course the corporation is entitled to -- I don't think there is any contribution for punitive damages. So the injustice of the thing is that the person who is assessed with the smaller of the awards ends up having to pay it themselves.

In this case Clyde Allison ends up having to pay the whole award himself, assuming it was in force, without the benefit of having the plaintiff first turn to the company. And that worked out because of an effort by the Court to avoid assessing the company twice. Now that the dust has settled I am trying to put myself back into the shoes that is back into the position we were in when we were discussing how the verdict form would be worded.

The question is, Mr. McCorriston, whether both Libbie Kamisugi and the Company are both individually liable for the full amount.

MR. MC CORRISTON: The Court understands what my position was on the verdict form and the judgment. As I understand the Court's ruling was that in so far as the judgment is concerned that Libbie Kamisugi individually and Libbie Kamisugi and Company would be joint and severally liable for the greater amount.

Naturally if either party pays any judgment, given the state of the evidence, I know who is going to end up paying it. But that's the status of the judgment. And that Clyde Allison would not be responsible for any part of the judgment against Libbie Kamisugi and Company. But neither would he get the benefit from what she paid. That's how the judgment is structured now.

THE COURT: What was your understanding, Mr. Au?

MR. AU: Your Honor, we did not want to have the corporation pay more than it was fair for them to pay. I think that was the whole basis of the Court's rulings in our discussions in chambers, more than they would have to pay. I think the Court's thinking around the whole thing as it turned out was that since Libbie, Ms. Kamisugi, owns 100 per cent of the corporation as a practical matter, whether the corporation paid it or she paid it, whether it was on the left or the right pocket, it would not make a substantial difference So the whole point of it was not to assess a greater amount to the corporation than was necessary. That's why the Court from the original verdict form, if you recall, took off Libbie and Company from Clyde Allison. It originally read Clyde Allison and Libbie and Company.

THE COURT: You are repeating what you said, now. If the theory was that because Clyde Allison and Libbie Kamisugi because their acts in effect are the acts of the corporation because of the high position they held in the

corporation, then that assessment against Libbie Kamisugi for which the corporation is also liable is joint and several and is reduced by the amount paid by either one of them; is it not? Since the corporation is being held liable because the act of Libbie Kamisugi was the act of the corporation. That was the theory. In other words, we did not get a separate -- in other words, the corporation was not assessed separately from Libbie Kamisugi. It was assessed the same amount as Libbie Kamisugi because the act of Libbie Kamisugi is the act of the corporation.

MR. AU: That's correct, Your Honor.

THE COURT: Therefore, to the extent the corporation pays the judgment the judgment is reduced. That is, the judgment against Libbie Kamisugi and the corporation for punitive damages, which is presently in the amount of $293,000, is reduced. To the extent Libbie Kamisugi pays it, it's reduced against the corporation.

MR. AU: I agree with the Court. I have no problem with that.

THE COURT: That was the question. Anything further?

MR. AU: The interest, the question of how will the Court be handling the issue of the interest, Your Honor?

THE COURT: We have a motion on pre-judgment interest pending and I will give you another date for a hearing on that.

MR. MC CORRISTON: Can we also be heard on security at that time so we don't have to come back another time?

MR. AU: What?

THE COURT: Security. That means supersedeas bond.

MR. MC CORRISTON: Or adequate security.

THE COURT: Or some type of security pending appeal. Another hearing date. How much time do you need?

MR. MC CORRISTON: Your Honor, I am sure I can do it on the same date the Court has convenient for Mr. Au.

THE COURT: The Court begins its vacation Thursday, so Wednesday is my last day. Wednesday is the last day. Vacation will carry me through the balance of next week and the week after. So we either have the hearing Wednesday. Maybe that would be a good time for the hearing. 1:30 Wednesday.

MR. MC CORRISTON: Your Honor, I assume the stay will continue until the Court rules and amends its judgment according to the rulings today.

THE COURT: Yes, under the procedure my understanding is that -- well, let me just speak to Mr. Au.

Your intent is not to attempt to enforce a judgment at this time.

MR. AU: Well, we can't, because we don't know the amount yet, Your Honor. That's what we are coming back for.

MR. MC CORRISTON: I think probably it's just a natural consequence until the judgment is amended it can't be executed. So I just assume we will continue.

THE COURT: Yes. Thank you, counsel. Court is recessed.

(The Court stood adjourned for the day.) (4:37 pm.)

APPENDIX G

PERMISSION TO COPY DENIED, HRS 606.13, etc.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

THE STATE OF HAWAII

HEINZ W. KUHNERT, et al.	) CIVIL NO. 88-3197
Plaintiffs.	)
vs.	)
CLYDE H. ALLISON, et al.	)
Defendants.	)

TRANSCRIPT OF PROCEEDINGS

before the Honorable LELAND SPENCER, Judge,

presiding, on AUGUST 29, 1990.

APPEARANCES:

For the Plaintiff — RONALD G. S. AU, ESQ.
GERALD H. KURASHIMA, ESQ.
Attorneys at Law

For Clyde Allison — PAUL A. LYNCH, ESQ.
Attorney at Law

For M. Libbie Kamisugi — WILLIAM MCCORRISTON, Esq.
JERROLD Y. CHUN , Esq.
Attorneys at Law.

REPORTED BY:
LAURA A. AWANA, RPR, CSR-238
OFFICIAL COURT REPORTER
STATE OF HAWAII

THE COURT: The record will reflect the presence of counsel.

The jury found in this case that the plaintiff's real estate agent, Clyde Allison and the principal acting broker, well that is to say the principal broker of Libbie & Company, namely Libbie Kamisugi breached fiduciary duties to the plaintiff and that those defendants, together with the defendant buyers Darlene and David Osterman, committed fraudulent misrepresentations or concealment.

The facts were detailed and involved and the evidence was both direct and circumstantial. In general, the case involved plaintiffs who entered into a DROA to sell a

Nuuanu home for one million three hundred thousand dollars by way of an agreement of sale with a portion of the purchase price to be a penthouse apartment valued for the purpose of the transaction at nine hundred and fifty thousand dollars.

The apartment was to be sold by the buyers within two years and proceeds of nine hundred and fifty thousand dollars from the sale were to be paid to the plaintiffs. If the apartment was not sold within two years, then the apartment was to be transferred to the plaintiffs with a value of nine hundred and fifty thousand dollars applied to the purchase price of the Nuuanu home.

Clyde Allison, the real estate agent for the plaintiffs and David and Darlene Osterman the buyers who were husband and wife and one of whom was a real estate agent, all represented to the plaintiff at a meeting at the plaintiff's house, prior to the signing of the DROA, that the

penthouse apartment was at that time worth a million dollars and could be sold for that amount.

The evidence was that the plaintiff relied upon and was induced by such representations to enter into the transaction.

David and Darlene Osterman, the buyers, did not disclose To the plaintiff that eighteen months earlier their penthouse apartment had been appraised at only four hundred and eighty five thousand dollars, all though the buyers not only had represented the current value of the apartment to be a million dollars, but knew that the plaintiff contemplated an immediate resale of the apartment for the purpose of raising nine hundred and fifty thousand dollars.

The evidence showed that the market, since the four hundred and eighty five thousand dollar appraisal had been relatively weak and flat.

Also undisclosed to the plaintiffs was the fact that prior to the execution of the DROA, Clyde Allison the

real estate agent had told Darlene Osterman, the buyer, that if she waived her commission as a real estate agent the transaction would go more smoothly.

And thereafter Darlene Osterman never requested a commission or involved her broker Luke & Luke and there was evidence that she never disclosed to the plaintiffs that she was a real estate agent prior to the execution of the DROA.

There was also evidence, this Court feels, from which the jury could find that Libbie Kamisugi was aware of the non disclosure prior to the DROA being signed of the fact that Darlene Osterman, one of the buyers, was a real estate agent.

Shortly after the DROA was executed and prior to the closing on the agreement of sale, Darlene Osterman transferred her real estate license to the plaintiff's broker which is the corporate defendant Libbie & Company.

The evidence showed that the plaintiff's principal broker, Libbie Kamisugi, was the president and one hundred percent owner of Libbie & Company.

There was evidence also that prior to the transaction, that is the closing of the DROA -- I'm sorry, the execution of the DROA, Libbie Kamisugi communicated with Clyde Allison about the possible transaction with the plaintiffs, that is between the plaintiffs and David and Darlene Osterman, and that Libbie Kamisugi approved the DROA shortly after the parties executed the document.

Evidence also showed that within a week or two after execution of the DROA and before the closing, Libbie Kamisugi approved the transfer of Darlene Osterman's real estate license to Libbie Kamisugi, Libbie and company.

The penthouse apartment did not sell within the two year period set forth in the DROA and resulting agreement of sale and hence was transferred to the plaintiffs

with the value of nine hundred and fifty thousand dollars applied toward the purchase price owed to the plaintiffs.

In February 1987 the plaintiffs sold the apartment for six hundred and twenty five thousand dollars. The jury returned a verdict against all the defendants for compensatory and punitive damages.

The defendants in this hearing seek judgment notwithstanding the verdict or new trial, complaining that there was a lack of evidence to support the verdict with respect to liability, compensatory and punitive damages.

Defendants also contend that the verdict form was erroneous and is itself a basis for a new trial.

The Court finds that all though the question is not an easy one, there was substantial evidence from which the jury could find that the defendants Clyde Allison, Libbie Kamisugi, Darlene and David Osterman conspired together to defraud the plaintiffs by persuading plaintiffs to accept the value of nine hundred and fifty thousand dollars on the

penthouse apartment by falsely representing even the defendants beliefs that the apartment had a current market value of a million dollars and that the apartment would sell for such amount.

The Court finds that there is substantial evidence, direct and circumstantial, to support the verdict with respect to liability, compensatory and punitive damages of the defendants.

The Court also finds that no objection was made to the verdict form at the time the verdict form was settled on the record, with respect to the complaints raised in these post trial motions. And thus, such complaints have been waived.

The Court will therefore deny the motions for judgment notwithstanding the verdict and for new trials. But the Court will set a date for further hearing on the issue of remittitur.

Perhaps I should backtrack and say at this point I'm not denying the -- no, let me stick with it, I will deny the motions for judgment notwithstanding the verdict and new trial and I am going to set a date for hearing on whether or not the Court should grant a remittitur and/or new trial, that is and/or permit the plaintiff to seek a new trial. And I will set that date next week, next Friday at 1:30 PM. Are there any questions?

MR. AU: Is the remittitur on all the damages or just on the punitive damages?

THE COURT: I haven't -- I haven't stated, I think right now it's an open question. I have told or discussed at least on the record a thought that forty two thousand dollars of the compensatory damages seemed in the Court's mind to be what the jury could have attributed to furnishings and I have expressed some concern as to whether or not furnishings is an item that should be the subject of a damage award over and above the three one and twenty five

thousand dollars. So that's just a discussion that I had on the record at our last hearing, and that certainly should give you some idea for thought.

MR. AU: May we file, with your permission, since it will be on the issue of actual damages as well then, your Honor, a motion immediately to be heard at 1:30 on the issue of whether or not the Court will allow prejudgment and post judgment interest?

THE COURT: You can certainly file a memo that addresses that.

MR. AU: To be heard next Friday.

THE COURT: Yes.

MR. AU: All right.

THE COURT: I don't want to -- there's still the issue as to whether or not prejudgment interest under the heading of remittitur should be taken out, that the jury assessed. I haven't indicated an inclination to do that but that's an issue open I think, and in any event if it isn't taken

out certainly the Court doesn't intend to permit double prejudgment interest.

MR. AU: Yes.

THE COURT: The only thing I am concerned about is in denying the motion for new trial, have I -- that the defendants seek, have I done something inconsistent with remittitur? I don't think so because in the remittitur procedure the plaintiff I think that he's given the option of new trial to protect the plaintiff's jury trial rights.

MR. AU: That's correct.

THE COURT: So I don't think I have done anything inconsistent. If I have, somebody will correct me.

MR. AU: Finally, may I prepare - may we prepare an order as to the extent of the Court's ruling today?

THE COURT: Yes.

MR. AU: Thank you, your Honor.

MR. MCCORRISTON: Your Honor, I presume the Court stay order and execution will continue until these matters are resolved.

THE COURT: Let's address this point. There's not only a stay order on execution but also the time running on the right of parties to appeal. I don't want that to become a problem. Why don't we --

MR. MCCORRISTON: When you enter the order denying the motion, the motions, I think we have a problem.

THE COURT: All right.

MR. MCCORRISTON: I think you could stipulate to extend the time for appeal. It is stayed by the motions pending, so all though the Court has orally ruled today, if it withholds the entry of the order until after the Friday -- next Friday's proceeding I don't think we will have a problem procedurally.

THE COURT: Mr. Au?

MR. AU: Well, until the Court rules on the entire motion, because it's a motion for remittitur, I don't see how the time runs Judge.

MR. MCCORRISTON: Motions for remittitur do not stay the appeal.

THE COURT: In any event, there's no prejudice to anybody by the Court not signing a motion denying the defendants -- that is not signing an order denying the defendant's motions pending the hearing on remittitur. So I think that's correct, that's a very practical way to address the problem of the running of the limitation period for the purpose of appeal.

Court is recessed.

MR. LYNCH: Excuse me, your Honor, next Friday September 8th? As opposed to this Friday.

THE COURT: A week from this Friday.

(Proceedings concluded.)

APPENDIX H

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Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT,	CIV. NO. 88-3197-10
Plaintiffs,	JUDGMENT
vs.	TRIAL: Commenced May 10, 1990
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation; MARION LIBBIE KAMISUGI; DARLENE M. OSTERMAN; HERBERT DAVID OSTERMAN, JOHN DOE 1-5, DOE CORPORATION 1-5, DOE PARTNERSHIP 1-5, and ROE GOVERNMENTAL ENTITY 1-5,	JUDGE: Hon. Leland H. Spencer
Defendants,	

JUDGMENT

Pursuant to the Special Verdict returned by the jury on June 19, 1990, after trial which commenced on May 10, 1990, with Ronald G. S. Au and Gerald H. Kurashima appearing for Plaintiffs Heinz N. Kuhnert and Sherilyn Marie Kuhnert; and Paul A. Lynch and Carolyn P. Egli and appearing for Defendants Clyde H. Allison, Libbie & Company, Inc., Marion Libbie Kamisugi, Darlene M. Osterman and Herbert David Osterman, this Court enters Judgment on the Complaint for the Plaintiffs as follows:

SPECIAL DAMAGES

1. Against Defendants Clyde H. Allison, Libbie & Company, Inc., a Hawaii corporation, Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman, jointly and severally, Special Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn

Marie Kuhnert in the sum of Four Hundred Ninety-Eight Thousand Six Hundred Twenty-Five and no/100ths Dollars ($498,625.00);

GENERAL DAMAGES

1. Against Defendants Clyde H. Allison, Libbie & Company, Inc., a Hawaii corporation, Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman, jointly and severally, General Damages to Plaintiff Heinz W. Kuhnert in the sum of Twenty Thousand and no/100ths Dollars ($20,000.00);

2. Against Defendants Clyde H. Allison, Libbie & Company, Inc., a Hawaii corporation, Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman, jointly and severally, General Damages to Plaintiff Sherilyn Marie Kuhnert in the sum of

Ten Thousand and no/100ths Dollars ($10,000.00).

PUNITIVE DAMAGES

1. Against Defendant Clyde H. Allison, Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of Five Hundred Thousand and no/100ths Dollars ($500,000.00).

2. Against Defendant Marion Libbie Kamisugi and/or Defendant Libbie & Company, Inc., Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of One Million Four Hundred Sixty-Five Thousand and no/100ths Dollars ($1,465,000.00).

3. Against Defendant Darlene M. Osterman, Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the

sum of Two Hundred Fifty Thousand and no/100ths Dollars ($250,000.00).

4. Against Defendant Herbert David Osterman, Punitive Damages to Plaintiffs Heinz Wi Kuhnert and Sherilyn Marie Kuhnert in the sun: of Two Hundred Fifty Thousand and no/100ths Dollars ($250,000.00).

Pursuant to the Special Verdict returned by the jury, the Court also enters judgment in favor of the Plaintiffs on Defendant Herbert David Osterman and Darlene M. Osterman's Counterclaim. There were no other named Defendants.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiffs shall have judgment on the Complaint in the amount of the damages stated herein and their reasonable costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Plaintiffs shall have judgment on the Counterclaim, and their reasonable costs.

Dated: Honolulu, Hawaii, August 1, 1990.

/s/ Leland H. Spencer (seal)
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/ Caroline P. Egli
PAUL A. LYNCH
CAROLYN P. EGLI
Attorneys for Defendants
Clyde H. Allison, Libbie
& Company, Inc.,
Darlene M. Osterman and
Herbert David Osterman

/s/ Jerrold Y. Chun
WILLIAM C. MCCORRISTON
JERROLD Y. CHUN
Attorneys for Defendant
Marion Libbie Kamisugi

APPENDIX I

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

THE STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT,	) CIVIL NO. 88-3197
Plaintiffs	) SPECIAL VERDICT
vs.	)
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation; MARION LIBBIE KAMISUGI; DARLENE M. OSTERMAN; and HERBERT DAVID OSTERMAN,	)
Defendants.	)

SPECIAL VERDICT

The jury must answer all of the questions unless otherwise indicated. To understand what issues are being submitted to you, you may wish to read over the entire Special Verdict before proceeding to answer. Answer the questions in numerical order. Follow all directions carefully.

Each answer requires the agreement of at least ten (10) jurors; however, the same ten (10) jurors need not agree on each answer. If you do not understand any question or if you wish to communicate with the Court on any other subject, you must do so in writing through the Bailiff.

CLAIMS OF HEINZ AND SHERILYN KUHNERT

1. Did any of the defendants commit fraudulent misrepresentation or fraudulent concealment?

Yes X No ___

If your answer is "yes", please put a check mark by such defendant or defendants, and then go to Question No. 2. If your answer is "no", go to Question No. 3.

Clyde H. Allison and Libbie & Company, Inc. X

Libbie Kamisugi and Libbie & Company, Inc. X

Darlene M. Osterman X

David Osterman X

2. Was the fraudulent misrepresentation and/or concealment by a defendant a legal cause of actual damage to the plaintiffs?

Yes X No ___

If your answer is "yes", please put a check mark by such defendant or defendants.

Clyde H. Allison and Libbie & Company, Inc. X

Libbie Kamisugi and Libbie & Company, Inc. X

Darlene M. Osterman X

David Osterman X

3. Did defendants, Clyde H. Allison and Libbie & Company, Inc., and/or Libbie Kamisugi and Libbie & Company, Inc. breach a fiduciary duty to the plaintiffs?

Yes X No ___

If your answer is "yes", please put a check mark beside the name of such defendant or defendants and go to Question No. 4. If your answer is "no", go to Question No. 5.

Clyde H. Allison and Libbie & Company, Inc. X

Libbie Kamisugi and Libbie & Company, Inc. X

4. Was the breach of a defendant's fiduciary duty a legal cause of actual damage to the plaintiffs?

Yes X No ___

If your answer is "yes", please put a check mark by such defendant or defendants.

Clyde H. Allison and Libbie & Company, Inc. X

Libbie Kamisugi and Libbie & Company, Inc. X

5. If your answer to Questions 2 and/or 4 was "yes", state the amount of actual damages suffered by the plaintiffs in the spaces set forth below. If your answers to Questions 2 and 4 are "no", then go to Question No. 1 under

"CLAIMS OF DEFENDANTS DARLENE AND DAVID OSTERMAN".

Heinz and Sherilyn Kuhnert:

Special Damages $498,625.00

Heinz Kuhnert:

General Damages $ 20,000.00

Sherilyn Kuhnert:

General Damages $ 10,000.00

6. Should any defendant be assessed with punitive damages?

Yes _X_ No ___

If so, place the amount of such assessment by such defendant or defendants:

Clyde H. Allison and
Libbie & Company, Inc. $ 500,000.00

Libbie Kamisugi and
Libbie & Company, Inc. $1,465,000.00

Darlene M. Osterman	$ 250,000.00
David Osterman	$ 250,000.00

CLAIMS OF DEFENDANTS

DARLENE AND DAVID OSTERMAN

1. Did plaintiffs or either of them commit fraudulent misrepresentation?

Yes ___ No X

If your answer is "yes", then go to the next question. If your answer is "no", then sign and date the verdict form and call the bailiff.

2. Was such fraudulent misrepresentation a legal cause of damage to defendants Darlene and David Osterman?

Yes ___ No ___

If your answer is "yes", then go to Question No. 3. If your answer is "no", then sign and date the verdict form and call the bailiff.

3. If your answer to Question No. 2 was "yes", then state actual damages sustained by the defendants as follows:

Darlene and David Osterman:

Special Damages $_____

4. Should plaintiff Heinz Kuhnert be assessed with punitive damages?

Yes ___ No ___

If your answer is "yes", state the amount thereof:

$_____

Dated at Honolulu, Hawaii, June 19th, 1990.

/s/ Ray Ng
Foreperson

APPENDIX J

If several persons combine and conspire to effect a common object, and it is arranged that each shall do certain acts and perform certain parts, with a view to the attainment of the same common result, and an overt act is committed in furtherance of the common object, all will be responsible for the acts of each of them.

APPENDIX K

PERMISSION TO COPY DENIED, HRS 606.13, etc.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

THE STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT, Plaintiffs vs. CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation; MARION LIBBIE KAMISUGI; DARLENE M. OSTERMAN; and HERBERT DAVID OSTERMAN, Defendants.	CIVIL NO. 88-3197 VOLUME V OF 5 VOLUMES Pages 1 - 58

TRANSCRIPT OF PROCEEDINGS

had before the HONORABLE LELAND H. SPENCER, Third Judge, presiding on Friday, June 15, 1990.

FURTHER JURY TRIAL.

APPEARANCES:

RONALD G. S. AU, ESQ.
GERALD H. KURASHIMA, ESQ. — For the Plaintiffs

PAUL A. LYNCH, ESQ.
CAROLINE P. EGLI, ATTY. — For the Defendants

REPORTED BY:
Lila H. M. Grumling, CSR 159
Official Court Reporter
First Circuit Court
State of Hawaii

MS. EGLI: Your Honor, through 103, all of the instructions are withdrawn except Instruction Number 30 to which we object to the court's refusal to read the instruction. And instructions 1 through 103 are agreed to by the parties.

THE COURT: State your position as to 30.

MS. EGLI: Thank you, Your Honor. We believe that Instruction 30 should be read to the jury as an indication of what they should consider if they do not find fraud -- or in order to find fraud, not inducement.

THE COURT: The court will refuse 30 over objection. And as you stated, 101 through 103 will be given by agreement.

MS. EGLI: That's correct.

THE COURT: And that completes the instructions.

We will reconvene in 10 minutes with the jury for purpose of final argument. Thank you, counsel.

MS. EGLI: Thank you.

(Discussion off the record)

THE COURT: Let's go back on the record.

Counsel, let me address the verdict form with you. It's been passed out to each of you. Are there any objections to the verdict form? Let me begin with you, Mr. Kurashima. I say that without prejudice to the objections that you've already put on the record insofar as the absence, for example, of a Chapter 480 claim.

MR. KURASHIMA: We have no objections with the verdict form.

THE COURT: All right, Ms. Egli?

MS. EGLI: Thank you, Your Honor. The defendants would like to note that the court has, in the verdict form, listed Clyde Allison together with Libbie & Company and, also, Libbie Kamisugi together with Libbie & Company. We understand that it's the court's feeling that they are both officers of the company and that the company, acting through them, should be listed as such. Therefore, when we get to item 6 in the verdict form where it assesses -- or asks the jury to assess punitive damages, there's a possibility of a double recovery from Libbie & Company with respect to punitive damages. It is our understanding that the court takes the position that it will handle that matter if it becomes necessary after the verdict is returned.

THE COURT: When you say the court takes that position, Ms. Egli, the court has stated to counsel, and will state on the record, that it is of the belief and will hold as a matter of law that, if Clyde Allison or Libbie Kamisugi is

liable for punitive damages, then the corporation, Libbie & Company, is liable for punitive damages without the requirement that the corporation had to have authorized, ratified, or participated in the wrongful act which gives rise to punitive damages. The reason the court makes this ruling is because the court is of the opinion that, as a matter law, both Clyde Allison, who is a vice-president or an acting vice-president of Libbie & Company, as well as Libbie Kamisugi are high enough in the management of the company so that the company becomes responsible even for punitive damages by reason of the acts of these corporate officers. Now, accordingly, the court has added Libbie & Company after the individuals.

The other option is to leave Libbie & Company out completely from the verdict form and have the court simply rule as a matter of law that, if the jury returns a verdict assessing punitive damages against any of these individuals, the court will simply rule as a matter of law that the

corporation is also liable. That's the other option. Is there anybody here who wants that option without prejudice to you objection as to the legal theory?

MR. EGLI: No, Your Honor.

THE COURT: All right, so without prejudice to your objection that the corporation be vicariously liable for punitive damages by reason of the conduct of these individuals, you don't object to Libbie & Company being in the verdict form in the form that it's in?

MS. EGLI: No, Your Honor.

MR. AU: May I note something for the record on this point, Your Honor?

THE COURT: Yes.

MR. AU: In the proposed Special Verdict form that we went over before arriving at this, I wish to note that we went over before arriving at this, I wish to note that Libbie & Company, Inc. was given a separate line. But because we were concerned that the jury might double the damages --

double the damages -- that this was the reason we went this route.

May I further note, Judge, that -- can we go off the record?

THE COURT: All right, off the record.

(Discussion off the record)

THE COURT: Back on the record.

Any other points to make in connection with the verdict form?

(No response)

THE COURT: Thank you, counsel. We'll reconvene in five minutes for purpose of final argument to the jury.

MR. KURASHIMA: Thank you, Your Honor.

MS. EGLI: Thank you.

APPENDIX L

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Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT,	) CIV. NO. 88-3197-10
Plaintiffs,	) PLAINTIFFS HEINZ KUHNERT AND SHERILYN MARIE KUHNERT'S PRE-TRIAL STATEMENT
vs.	
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation; MARION LIBBIE KAMISUGI; DARLENE M. OSTERMAN; HERBERT DAVID OSTERMAN, JOHN DOE 1-5, DOE CORPORATION 1-5, DOE PARTNERSHIP 1-5, and ROE GOVERNMENTAL ENTITY 1-5,	
Defendants.	

PLAINTIFFS HEINZ AND MARIE KUHNERT'S
PRETRIAL STATEMENT

I. Statement of Facts

This is an action for fraud, misrepresentation, breach of fiduciary duty, violation of Haw. Rev. Stat., Chapter 480, Unfair and Deceptive Trade Practices and for the violation of Hawaii Real Estate Commission Rules and Haw. Rev. Stat., Chapter 467-14, which governs the licensing and conduct of real estate brokers and salesmen.

On or about August 23, 1982, Plaintiffs entered into an Exclusive Right-to Sell residential real estate listing contract with Defendant Libbie & Company, Inc. (hereinafter referred to as Defendant "Libbie & Co., Inc.") to sell Plaintiff's property located at 3762 Old Pali Road, City and County of Honolulu, State of Hawaii (hereinafter referred to as the "Old Pali Road" property). Defendant Clyde H. Allison (hereinafter referred to as Defendant "Allison") was the listing real estate agent and Libbie & Co., Inc. acted as

the real estate broker in the transaction. Defendant Marion Libbie Kamisugi (hereinafter referred to as Defendant "Kamisugi") was President and Director of Defendant Libbie & Co., Inc. The listing agreement obtained by Libbie & Co., Inc. was for one year and scheduled to expire on August 22, 1983. The contract provided for a six percent (6%) commission on the sales price to Libbie & Co., Inc.

On or about June 23, 1983, with less than one month remaining on the Exclusive Right-to-Sell contract, Defendant Allison prepared a Deposit Receipt Offer and Acceptance (DROA) for Defendant Darlene Osterman and submitted DROA to Plaintiffs for the Old Pali Road property at the listing price of One Million Three Hundred Thousand Dollars ($1,300,000.00).

The DROA was prepared at 1 p.m. on June 23, 1983 with an acceptance by Plaintiffs due by 3 p.m. on the same day. Plaintiffs accepted the offer by Defendants Herbert David Osterman and Darlene Osterman (hereinafter referred

to as Defendants Osterman) to purchase the Old Pali Road property, within the short span of time available for acceptance, but at no time were Plaintiffs advised by Defendant Allison to carefully review the offer nor did Defendant Allison recommend the DROA be reviewed by legal counsel. In addition, although Defendant Allison knew that Defendant Darlene Osterman was a licensed real estate sales agent, this information was not disclosed to the Plaintiffs prior to Plaintiffs' acceptance of the offer by either Defendants Osterman, Defendant Allison nor Defendant Libbie & Company, Inc.

Under the terms and provisions of the DROA, the purchase price of the Old Pali Road residence of One Million Three Hundred Thousand Dollars ($1,300,000.00) was payable in the form of a One Hundred Thousand Dollar ($100,000.00) cash deposit with the balance by way of a two-year agreement of sale at eleven percent (11%) interest only per annum. A special provision of the DROA, provided

that if Defendants Osterman were unable to sell the condominium apartment owned by them and located at the Punahou Regency, 1114 Punahou Street in the City and County of Honolulu, State of Hawaii (hereinafter referred to as "Punahou Regency") within two-years of the Agreement of Sale, Plaintiffs would purchase the Punahou Regency property for the sum of Nine Hundred Fifty Thousand Dollars ($950,000.00).

Defendant Allison and Defendants Osterman represented to Plaintiffs that the Punahou Regency property was worth over one million dollars and included the exclusive custom furnishings. Defendant Allison has contradicted his own testimony by stating at one time under oath, that he understood the custom furniture was to be included with the Punahou Regency property, while in a later deposition, he stated the furniture was not part of the transaction.

Defendant Allison tacitly accepted Defendants Osterman representation that the Punahou Regency unit was worth over one million dollars and would be sold with two years Defendant Allison conducted no appraisal and although he had no training or expertise in appraising real property. Defendant Allison also claims he did not inquire whether the Defendants Osterman's had ever had the property appraised, when in fact, an appraisal was conducted by the Defendants Ostermans on or about December 15, 1981 which indicated a market value of only Four Hundred Eighty-five Thousand Dollars ($485,000.00).

The DROA was presented to Defendant Kamisugi, as broker in charge of Defendant Libbie & Co., Inc., for her review and approval at the Waikiki Yacht Club on the same evening, June 23, 1983. The DROA, as written by Defendant Allison, was approved by Defendant Kamisugi with no changes made to it although the DROA did not address inclusion of the furnishings and also did not

guarantee Plaintiffs would receive any monies to total $950,000.00, should the Punahou Regency property sell for less than $950,000.00. The DROA also did not protect Plaintiffs' right to possession of the Punahou Regency during the two years. Rather than have these items clearly delineated to protect the Plaintiff's rights and interests, Defendant Kamisugi provided only the most cursory review and approved the DROA.

On July 7, 1983, prior to the closing of the Old Pali Road transaction and entering the Agreement of Sale on August 1, 1983, Defendant Darlene Osterman transferred her real estate license to the supervision and control of Defendant Libbie & Co., Inc.

On August 1, 1983, pursuant to the terms and provisions of the DROA, Plaintiffs by and through their attorneys in fact, Dianne Lee (now known as Dianne Merritt), entered into an Agreement of Sale with Defendants Osterman for the sale of the Old Pali Road property on the

terms and conditions as described above in the DROA. The Agreement of Sale contained the condition that in the event purchaser (Defendants Osterman) have not sold Apartment No. PH-2 of the Punahou Regency condominium project at 1114 Punahou Street, Honolulu, Hawaii, by August 2, 1985, Seller (Plaintiffs), would purchase the Punahou Regency apartment for the sum of Nine Hundred Fifty Thousand Dollars ($950,000.00).

After Plaintiffs entered into the Agreement of Sale, Defendant Libbie & Co., Inc., as the real estate broker and Defendant Allison and Defendant Darlene Osterman, as the real estate agents, entered into a listing agreement with Defendants Osterman for the sale of the Punahou Regency property at One Million One Hundred Thousand Dollars ($1,100,000.00). The listing agreement between Defendant Libbie & Co., Inc. and Defendants Osterman was entered into prior to the closing of the Agreement of Sale for the Plaintiff's Old Pali Road property and prior to or soon after

Defendant Darlene Osterman's real estate license was transferred to Defendant Libbie & Co., Inc., on July 7, 1983.

Defendant Libbie & Co., Inc. marketed the Punahou Regency property for two-years, but during that period, did not receive any offers at the listing price of $1,200,000.00. Despite not having received any offers during the two-year period, Defendants osterman made no effort to reduce the listing price and at no time did either Defendant Libbie & Co., Inc. nor Defendant Allison question or attempt to determine the true market value of the Punahou Regency property. The defendants instead rented the property with Libby and Company, Inc. receiving a commission on rentals.

Defendants Osterman were unable to sell the Punahou Regency property and in accordance with the terms and provisions of the Agreement of Sale of August 1, 1985, Plaintiffs purchased the Punahou Regency property from Defendants Osterman for the sum of Nine Hundred Fifty

Thousand Dollars ($950,000.00), with said sum being applied to the remaining balance due in the agreement of sale for the Plaintiff's Old Pali Road property.

The Plaintiff commissioned an appraisal of the property, which indicated the Punahou Regency had a market value of $485,000 as of June 17, 1985, not nearly the $950,000.00 value as represented by the Defendants Libbie & Co., Inc., Allison and the Osterman's. On or about March 14, 1987, Plaintiffs sold the Punahou Regency for the sum of Six Hundred Fifty Thousand Dollars ($650,000.00).

Defendant Darlene Osterman fraudulently misrepresented the market value of the Punahou Regency property and Defendant Allison, Defendant Libbie & Co., Inc. and Defendant Kamisugi transmitted this information to Plaintiffs who relied on the information to their detriment. Such representations were false and known to be false by Defendants Osterman and made solely to induce Plaintiffs to accept their offer. Defendant Allison and Defendant Libbie

& Co., Inc. failed to discover the fraudulent misrepresentations and failed to protect the Plaintiff's interests. Defendant Libbie & Co., Inc. breached the fiduciary duty owed to Plaintiffs by employing the services of Defendant Darlene Osterman as a real estate agent while still representing the Plaintiffs in the sale of their Old Pali Road property. Defendant Kamisugi willfully perpetuated a fraud on Plaintiffs by failing to disclose the dual agency relationship between Defendant Libbie & Co., Inc. and Defendants Osterman's joint relationship as the buyer of the Old Pali Road property, as a real estate agent employed by Libbie & Co., Inc., as the listing agent with Defendant Allison and also as the seller of the Punahou Regency property.

The acts of Defendants were so willful, malicious, intentional, gross and made with such reckless disregard for Plaintiffs' rights to justify the imposition of punitive damages. Plaintiffs are entitled to rescission of the contract

for the sale of the Old Pali Road property because of the fraud perpetuated on Plaintiffs. Plaintiffs are entitled to restitution of real estate commissions paid to Defendant Libbie & Co., Inc. on the sale of the Old Pali Road property. Plaintiffs are also entitled to treble damages as provided for under Haw. Rev. Stat. §480-13 against Defendant Libbie & Co., Inc. and Defendant Allison for the unfair and deceptive trade practices committed.

II. Admitted Facts

Plaintiffs admits the residency of Defendants Allison, Defendants Osterman and Defendant Kamisugi, and the corporate status of Defendant Libbie & Co., Inc. Plaintiffs admit the allegations in paragraph 3 of Defendants Osterman's Counterclaim as to the date the Plaintiff and Defendants Osterman entered into a contract for the sale of the Plaintiffs' Old Pali Road property. The Plaintiffs deny and dispute all other facts and allegations alleged in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17,

18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 and Count VIII of Defendants Osterman's Counterclaim and all other allegations contained therein.

III. Claims for Relief and Evidence in Support Thereof

Plaintiffs will offer lay and expert testimony and documentary evidence in support of the following claims for relief:

A. Intentional and Negligent Misrepresentation and Fraud. A broker can be held responsible for intentional and negligent misrepresentations and fraud made by his agent. There may be a duty to speak when silence can be construed to be agreement. Au v. Au, 63 Haw. 210, 626 P.2d. 173 (1981). A real estate broker is required to disclose to a buyer, material defects known to the broker but unknown to and unobservable by purchaser. Easton v. Strassburger, 199 Cal.Rptr. 383 (Cal. App. 1 Dist. 1984).

B. Breach of Fiduciary Duty. By virtue of their position as real estate broker and agent, Libbie & Co., Inc. and Defendant Allison breached their fiduciary duty to Plaintiffs by the following:

1. Failure to properly determine and disclose to the Plaintiffs the true value of the Punahou Regency property.

2. Misrepresentation of the value of the Punahou Regency property by relying on the representations made by Defendant Darlene Osterman, without conducting an investigation to determine the actual market value of the property.

3. Misrepresentation that the furniture was to be included with the Punahou Regency property.

4. Failure to disclose to Plaintiffs that Defendant Darlene Osterman was a licensed real estate agent and also the buyer of the Old Pali Road property.

5. Failure to disclose to Plaintiffs the dual agency relationship with Defendant Libbie & Co., Inc. as the employer of Defendant Darlene Osterman, who was also at the same time, the buyer of the Old Pali Road property and seller of the Punahou Regency property.

6. Failure to obtain the Plaintiffs consent to the dual representation of the Plaintiffs as sellers of the Old Pali Road property and Defendants Osterman as the buyer of the Old Pali Road property and also as seller of the punahou Regency property. A real estate agent bears a duty to make a full, fair, and timely disclosure to the principal of all facts within the agent's knowledge which are, or may be material to the transaction and which might affect the principal's rights and interests or influence his actions. A dual agency is permissible only where the real estate agent obtains the consent of both principals after full disclosure. Breach by a real estate broker of the duty of full disclosure deprives him

of his right to a commission. Property House, Inc. v. Kelley, 68 Haw., 715 P.2d 805 (1986).

C. Respondent Superior. Real estate agent Defendant Allison acted within the scope of his employment and had also held out to the public, with the knowledge and consent of Defendant Libbie & Co., Inc., that Defendant was an officer of Libbie & Co., Inc. Damages may be recovered from the employer of a tortfeasor agent when the tortious act complained of was within the scope of employment. Abraham v. Onorato Garages, 50 Haw. 628, 632 (1968).

D. Promissory Estoppel and Equitable Estoppel. Defendant Libbie & Co. cannot deny that representations by Defendant were outside the scope of his employment. Equity has long afforded relief to one who has incurred substantial detriment on the faith of another's promise. Motonaga v. Ishimaru, 38 Haw. 158 (1948). The essence of promissory estoppel is detrimental reliance on a promise. A promise which the promisor should reasonably expect to induce action

or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. Ravelo v. County of Hawaii, 66 Haw. 194, 658 P.2d 883 (1983). A corporation which places an officer or agent in such a position where persons of ordinary prudence are justified in assuming that the agent has such authority to perform the act in question, is estopped from denying the officer's or agent's authority. Cosmopolitan Financial Corp. v. Runnels, 2 Haw.App. 33, 625 P.2d 390 (1981).

E. Punitive Damages. Plaintiff claims punitive damages against all parties. The intentional fraudulent acts committed by the Defendants warrants imposition of punitive damages. Exemplary or punitive damages need not bear any relation to the damages allowed by way of compensation but the measure of such damages should be the degree or malice, oppression or gross negligence which forms the basis of the

award. Howell v. Associated Hotels, Limited, 40 Haw. 492 (1954).

F. Rescission. The Plaintiffs are entitled to rescission of the sale of the Old Pali Road property and restitution of commissions paid to Defendant Libbie & Co., Inc. because of the intentional misrepresentations by the Defendants, upon which Plaintiffs relied to their detriment.

G. Unfair and Deceptive Trade Practices. The acts of real estate broker, Libbie & Co., Inc. and real estate agents, Defendant Allison, and Defendant Darlene Osterman, constituted unfair and deceptive trade practices under Chapter 480, H.R.S. and are subject to treble damages. Ai v. Frank Huff Agency, 61 Haw. 607, 607 P.2d. 1304 (1980).

H. Violation of Haw. Rev. Stat. § 467-14. Defendants Allison, Libbie & Co., Inc., Kamisugi and Darlene Osterman, as a real estate broker or agent, owed Plaintiffs a duty to refrain from fraudulent conduct under Haw. Rev. Stat. § 467-14, governing the licensing and

conduct of real estate brokers and salesmen and also the Hawaii Real Estate Commission Rules § 16-99-3 (1984) which has been adopted to clarify and implement Haw. Rev. Stat. Chapter 467.

I. Plaintiffs reserve the right to amend this pre-trial statement to include other claims and defenses that are warranted by discovery of evidence in this litigation.

IV. Lay Witnesses.

Plaintiffs intend to call the following persons as witnesses:

A. Heinz Kuhnert, Plaintiff, c/o Ronald G. S. Au, 1120 Pacific Tower, 1001 Bishop Street, Honolulu, Hawaii 96813, will testify as an eye witness to both liability and damages. He will further testify as to the allegations in the Complaint.

B. Sherilyn Marie Kuhnert, Plaintiff, c/o Ronald G. S. Au, 1120 Pacific Tower, 1001 Bishop Street, Honolulu, Hawaii 96813, will testify as an eye witness to

both liability and damages. She will further testify as to the allegations in the Complaint.

C. Dianne Merritt, c/o Ronald G. S. Au, 1120 Pacific Tower, 1001 Bishop Street, Honolulu, Hawaii 96813. She will testify as to the allegations in the Complaint.

D. Sidney S. Uyetake, c/o Uyetake, Uyetake and Associates, 900 Fort Street Mall, Suite 1060, Honolulu, Hawaii 96813. He will testify as an eye witness on matters relating to the appraisal of the Punahou Regency property for Defendant Osterman.

E. Harlin S.K.Y. Young, SRA, 222 Vineyard Blvd., Honolulu, Hawaii 96813. He will testify as an eye witness on matters relating to the appraisal of the Punahou Regency property for Plaintiffs.

F. Dona Aumann, address unknown. She will testify as an eye witness to matters related to the listing of the Punahou Regency property for Plaintiffs.

G. Dennis Michalek, address unknown. He will testify as an eye witness to matters related to the listing of the Punahou Regency property for Plaintiffs.

H. Mary Ann Nevels, 542 Kumukahi Place, Honolulu, Hawaii 96825 c/o Ronald G. S. Au, 1120 Pacific Tower, 1001 Bishop Street, Honolulu, Hawaii 96813. She will testify as an eye witness to matters related to the listing of the Punahou Regency property for Plaintiffs.

I. Muriel Patterson, address unknown. She will testify as an eye witness to matters related to the listing of the Punahou Regency property for Plaintiffs.

J. Marshall Goldman, c/o Professional Realty Corp., 3103 Pualei Circle, Honolulu, Hawaii 96815. He will testify as an eye witness on matters relating to the sale of the Punahou Regency property for Plaintiffs.

K. Ann Fukuzaki, c/o Long and Melone Escrow Ltd., 6650 Hawaii Kai Drive, Honolulu, Hawaii 96825. She

will testify as an eye witness to the closing on the sale of the Old Pali Road property.

L. Clyde H. Allison, Defendant, c/o Stephen D. Whittaker, Grosvenor Center, Mauka Tower, Suite 2500, 737 Bishop Street, Honolulu, Hawaii 96813, who will testify as an eye witness to liability.

M. Jane McGregor Allison, c/o Stephen D. Whittaker, Grosvenor Center, Mauka Tower, Suite 2500, 737 Bishop Street, Honolulu, Hawaii 96813, who will testify as an eye witness to liability.

N. Marion Libbie Kamisugi, Defendant, c/o Stephen D. Whittaker, Grosvenor Center, Mauka Tower, Suite 2500, 737 Bishop Street, Honolulu, Hawaii 96813, who will testify as an eye witness to liability.

O. Herbert David Osterman, Defendant, c/o Stephen D. Whittaker, Grosvenor Center, Mauka Tower, Suite 2500, 737 Bishop Street, Honolulu, Hawaii 96813, who will testify as an eye witness to liability.

P. Darlene M. Osterman, Defendant, c/o Stephen D. Whittaker, Grosvenor Center, Mauka Tower, Suite 2500, 737 Bishop Street, Honolulu, Hawaii 96813, who will testify as an eye witness to liability.

Q. Dale Bordner, c/o Bordner Realty, 1806 S. King St. Suite 31, Honolulu, Hawaii 96813, who will testify as an eye witness to procedures and practices of Libbie & Co., Inc.

R. Cindy Bell Ayau, address unknown. She will testify as an eye witness to procedures and practices of Libbie & Co., Inc.

S. Jane Stubenberg, c/o Armand Cote, 1434 Kalaniiki Street, Honolulu, Hawaii 96821, who will testify as an eye witness to procedures and practices of Libbie & Co., Inc.

T. Edson S. Lott, 52 Lawai St. Honolulu, Hawaii 96825, who will testify as an eye witness to procedures and practices of Libbie & Co., Inc.

U. Tom Parker, address unknown. He will testify as an eye witness to procedures and practices of Libbie & Co., Inc.

V. Betsy Christianson, address unknown. She will testify as an eye witness to procedures and practices of Libbie & Co., Inc.

W. Linda Payes, 933 Makaiwa Street, Honolulu, Hawaii 96816, who will testify as an eye witness to the conduct of Defendant Kamisugi.

X. Gilbert Matsumoto, 1060 Young Street, Suite 325, Honolulu, Hawaii 96814, who will testify as an eye witness to the financial status of Defendant Libbie & Co., Inc. and employment records of Defendant Allison.

Y. Carter Freeman, address unknown. He will testify as an eye witness to the financial status of Defendant Libbie & Co., Inc. and employment records of Defendant Allison.

Z. Ray Kajimura, 1481 S. King Street, Room 540, Honolulu, Hawaii 96817, who will testify as an eye witness to the financial status of Defendant Libbie & Co., Inc.

AA. Gloria Damron, 377 Keahole Street, Suite 200, Honolulu, Hawaii 96825, who will testify as an eye witness to matters related to the employment of Defendant Allison as a real estate agent.

BB. Herbert Luke, c/o ERA Jones Realty, 1347 Kapiolani Blvd., 4th Floor, Honolulu, Hawaii 96814, who will testify as an eye witness to matters related to the employment of Defendant Darlene Osterman as a real estate agent.

CC. Witnesses named by the other parties.

DD. Rebuttal witnesses.

EE. Other witnesses learned through continuing discovery.

V. Exhibits.

To be designated at the time of trial.

VI. Expert Witnesses.

A. A representative of the Honolulu Board of Realtors who will testify on the Code of Ethics and Standards of Practice of the National Association of Realtors, to be named at a later date.

B. An expert who will testify as to real estate appraisal practices and techniques, to be named at a later date.

C. An expert who will testify as to agency and fiduciary duties of real estate brokers and agents, to be named at a later date.

VII. Statement of Trial Readiness.

A. Defendant and Third Party Plaintiff's discovery is not substantially completed, however any further discovery can readily be completed provided trial is not set earlier than May 1990.

B. Estimated length of trial: Ten days before a jury.

VIII. Statement of Settlement Conference.

Plaintiffs are willing to discuss settlement after discovery is completed. Discovery is still actively ongoing and Plaintiffs are not ready for trial. Amendments to the pleadings are contemplated.

Dated: Honolulu, Hawaii, October 12, 1989.

/s/ Ronald G. S. Au
RONALD G. S. AU
Attorney for Plaintiffs Heinz
and Sherilyn Marie Kuhnert

APPENDIX M

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Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT,	CIV. NO. 88-3197-10
Plaintiffs,	COMPLAINT; EXHIBIT A AND B; DEMAND FOR TRIAL BY JURY; SUMMONS
vs.	
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation; MARION LIBBIE KAMISUGI; DARLENE M. OSTERMAN; HERBERT DAVID OSTERMAN, JOHN DOE 1-5, DOE CORPORATION 1-5, DOE PARTNERSHIP 1-5, and ROE GOVERNMENTAL ENTITY 1-5,	
Defendants.	

COMPLAINT

Come now Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert (hereinafter referred to as "Plaintiffs") and through their attorney, Ronald G. S. Au, and for claims against the Defendants Clyde H. Allison, Libbie & Company, Inc., a Hawaii corporation, Marion Libbie Kamisugi, Darlene M. Osterman, Herbert David Osterman, John Doe 1-5, Doe Corporation 1-5, Doe Partnership 1-5, and Roe Governmental Entity 1-5 allege and aver as follows:

First Claim

1. Plaintiffs are husband and wife and at all times relevant herein were residents of the City and County of Honolulu, State of Hawaii.

2. Defendant Clyde H. Allison, (hereinafter referred to as "Allison") was at all times relevant herein a resident of the City and County of Honolulu, State of Hawaii

and a person licensed by the State of Hawaii to engage in the business of real estate sales.

3. Defendant Libbie & Company, Inc., is a corporation organized under the laws of the State of Hawaii and licensed by the State of Hawaii to engage in the business of real estate sales and brokerage.

4. Defendants Darlene M. Osterman and Herbert David Osterman (hereinafter referred to as "Ostermans") and Marion Libbie Kamisugi were at all times relevant herein residents of the City and County of Honolulu, State of Hawaii. Defendants Darlene M. Osterman and Marion Libbie Kamisugi are persons licensed by the State of Hawaii to engage in the business of real estate sales and brokerage.

5. Defendants John Doe 1-5, Doe Partnership 1-5, Doe Corporation 1-5 and Roe Governmental Entity 1-5 are individuals, partnerships, corporations and governmental entities, designated as such, who are being sued under fictitious names for the reason that their true names and

identities are unknown to the Plaintiffs but said Defendants are connected in some manner with the named Defendants and are agents, servants, masters, employees, employers, representatives, co-venturers, associates, vendors, suppliers, and/or owners, lessees, assignees and licensees of the above-named Defendants and/or were in some manner, presently unknown to Plaintiffs, engaged in the activities alleged herein and/or were in some manner responsible for the damages to Plaintiffs and/or conducted some activity in an intentional, fraudulent or deceptive or negligent manner; which conduct was a proximate cause of damages to Plaintiffs and/or were in some manner related to the named Defendants, and their identities can best be determined by further discovery with the above-named Defendants.

6. Prior to June 1983, Plaintiffs engaged the professional services of Defendants Allison and Libbie & Company, Inc., to offer for sale their residence located at 3762 Old Pali Road in the City and County of Honolulu,

State of Hawaii. Defendant Allison was the supervisor, director and controller of Defendant Libbie & Company, Inc., and Marion Libbie Kamisugi was President and Director of Libbie & Company, Inc.

7. On or about June 23, 1983, Plaintiffs accepted a written offer to purchase (DROA) their Old Pali Road residence from Defendants Osterman. The DROA had been procured and/or solicited through the efforts of Defendants Allison and Libbie & Company, Inc., and Defendant Marion Libbie Kamisugi and in consideration thereof Plaintiffs agreed to pay to Defendant Libbie & Company, Inc., a brokerage fee of six percent (6%). (A copy of the DROA is attached hereto as Exhibit A and incorporated herein by reference).

8. Under the terms and provisions of said DROA, the purchase price of the Old Pali Road residence was One Million Three Hundred Thousand Dollars ($1,300,000.00) payable in the form of One Hundred Thousand Dollars

(100,000.00) cash deposit with the balance by way of a two (2) year agreement of sale at eleven percent (11%) interest only per annum. A special provision of said DROA provided that if Defendants Osterman were unable to sell a certain condominium apartment owned by them and located at the "Punahou Regency Apartments" at 1114 Punahou Street in the City and County of Honolulu, State of Hawaii (hereinafter referred to as "Punahou Regency") within two (2) years of said agreement of sale, Plaintiffs would purchase the Punahou Regency property for the sum of Nine Hundred Fifty Thousand Dollars ($950,000.00).

9. On August 1, 1983, pursuant to the terms and provisions of the DROA, Plaintiffs by and through their attorneys in fact, Dianne Lee (now known as Dianne Merritt), entered into an Agreement of Sale with Defendants Osterman for the sale of the Old Pali Road property on the terms and conditions herein before described in the DROA. The Agreement of Sale contained the covenant and agreement

that in the event purchaser (Defendants Osterman) shall not have sold Apartment No. PH-2 of the Punahou Regency condominium project situated at 1114 Punahou Street, Honolulu, Hawaii, by August 2, 1985, Seller (Plaintiffs) will purchase from Purchaser said apartment for the sum of Nine Hundred Fifty Thousand Dollars ($950,000.00). (A copy of the Agreement of Sale is attached hereto as Exhibit B and incorporated herein by reference).

10. Upon information and belief, shortly after Plaintiffs entered into said agreement of sale, Defendant Dianne M. Osterman placed or otherwise transferred her real estate license to the supervision and control of Defendant Libbie & Company, Inc., the Defendant Marion Libbie Kamisugi knew or should have known of the fraud and misrepresentation.

11. After Plaintiffs entered into said Agreement of Sale, Defendants Libbie & Company, Inc., Allison and Darlene M. Osterman as real estate agents and Defendant

Osterman as a seller, listed and placed the Punahou Regency property on the market for sale at One Million One Hundred Thousand Dollars ($1,100,000.00).

12. Said Defendants were unable to sell the Punahou Regency property within two (2) years of the agreement of sale for the purchase of Plaintiffs' Old Pali Road property.

13. Since Defendants were unable to sell the Punahou Regency property in accordance with the terms and provisions of said agreement of sale on August 1, 1985, Plaintiffs purchased the Punahou Regency property from Defendants Osterman for the agreed sum of Nine Hundred Fifty Thousand Dollars ($950,000.00) with said sum being applied to the remaining balance due in the agreement of sale.

14. Defendants never disclosed nor did the Plaintiffs learn that laid property has a market value substantially less than $950,000.00 in the agreement of sale.

15. On or about March 14, 1987, Plaintiffs sold the Punahou Regency for the sum of Six Hundred Fifty Thousand Dollars ($650,000.00).

16. The intentional and deliberate misrepresentations by the Defendants as seller and broker, constitute fraud and concealment since the Defendants had full knowledge since June 1983 that the Punahou Regency PH 2 was appraised substantially less than the value given by Defendants of Nine Hundred Fifty Thousand Dollars ($950,000.00) and said fraudulent misrepresentation was made to induce Plaintiffs to sell the residence at 3762 Old Pali Road.

17. A direct result of the fraudulent representation of Defendants acting in conspiracy to defraud Plaintiffs, the Plaintiffs have sustained special damages to be proven at trial, emotional distress and general damages to be proven at trial.

Second Claim

18. Plaintiffs reallege and incorporate by this reference the allegations contained in paragraphs 1 through 17 as though fully stated herein and for a Second Claim alleges and avers as follows:

19. The oral material fraud and misrepresentation of the Defendants made with the express purpose and intent of inducing Plaintiffs to sell and exchange 3762 Old Pali Road to the material detriment of the Plaintiffs constitute a breach of promissory estoppel for which the Defendants are estopped to deny.

20. The Defendant as seller and Defendant as real estate broker and salesman on or before August 1, 1985, represented and promised that the Punahou Regency PH 2 could be sold for not less than' $950,000.00, and the Plaintiffs relied on this material misrepresentation.

21. The Plaintiffs have made demand to the Defendants to pay the difference between $650,000 and

$950,000 to no success and said failure of Defendants constitute a breach of promissory estoppel.

22. As a result of the Defendants' breach of promissory estoppel, Plaintiffs have sustained such special damages as will be shown at trial, emotional distress and general damages as will be shown at trial.

Third Claim

22. Plaintiffs reallege and incorporate by this reference the allegations contained in paragraphs 1 through 21 as though fully stated herein and for a Third Claim alleges and avers as follows:

23. The intentional conduct of Defendants acting in a concerted conspiracy to jointly defraud the Plaintiffs have resulted in a windfall to the Defendants.

24. To the Plaintiffs' information and belief the Defendants Osterman have since made efforts to resell 3762 Old Pali Road in substantial excess of the $950,000 value assessed in June of 1983.

25. This fraudulent conduct and misrepresentation used by Defendants to obtain 3762 Old Pali Road from the Plaintiffs should inure to the benefit of the Plaintiffs and the Plaintiffs should be entitled to a recision of the agreement of sale for 3762 Old Pali Road and Plaintiffs should be returned to the title of 3762 Old Pali Road or in the alternative Plaintiffs should be entitled to any windfall profit because of the fraud and misrepresentation of the Defendants acting in concerted consent.

26. The Plaintiffs request a recision of the agreement of sale transferring title to 3762 Old Pali Road from Defendant Darlene M. Osterman and Defendant Herbert David Osterman or in the alternative that any windfall profit be determined by the Court to be damages and the property of Plaintiffs at trial.

Fourth Claim

27. Plaintiffs reallege and incorporate by this reference the allegations contained in paragraphs 1 through

26 as though fully stated herein and for a Fourth Claim alleges and avers as follows:

28. Defendants Libbie & Company, Inc., Marion Libbie Kamisugi, Darlene M. Osterman and Clyde H. Allison have contractual duty under the contract as real estate brokers and agents for Plaintiffs, to protect the interests of Plaintiffs during the negotiations for the sale of the Old Pali Road property under the agreement of sale, specifically, but not limited to obtain or otherwise provide Plaintiffs with appraisal and market data or other information regarding the fair market value of the Punahou Regency property which was the subject of the agreement of sale.

29. That the contractual duty to disclose includes all material information on the DROA and agreement of sale, or listing agreement and includes disclosure of any appraisal that would show the value of the Punahou Regency PH 2, which Defendants had knowledge of and deliberately withheld it from Plaintiffs.

30. That as a direct result of the breach of their duty of disclosure under the DROA or agreement of sale or listing agreement and fraudulent conduct, the Plaintiffs have sustained such special and general damages and emotional distress as will be shown at trial.

Fifth Claim

31. Plaintiffs reallege and incorporate by this reference the allegations contained in paragraphs 1 through 30 as though fully stated herein and for a Fifth Claim alleges and avers as follows:

32. The Defendant Darlene M. Osterman was directly employed as an agent or a representative of Defendant Libbie & Company, Inc., Defendant Darlene M. Osterman, and Defendant Marion Libbie Kamisugi and intentionally and fraudulently did not disclose this employment relationship to the Plaintiffs.

33. As a direct result of the fraudulent conduct of Defendants Darlene M. Osterman, Libbie & Company, Inc.,

and Marion Libbie Kamisugi, the Plaintiffs sustained such special damages as will be proven at time of trial and emotional distress and general damages as will be proven at time of trial.

Sixth Claim

34. Plaintiffs reallege and incorporate by this reference the allegations contained in paragraphs 1 through 33 as though fully stated herein and for a Sixth Claim alleges and avers as follows:

35. The conduct of Defendants acting as real estate salesperson and brokerage agents constitute a breach of fiduciary duty to the Plaintiffs and a breach of conflict of interests under the DROA, agreement of sale and listing agreement.

36. As a direct result of the breach of fiduciary duty owed to Plaintiffs by Defendants acting as salespersons, brokers or agents of the Plaintiffs, the Plaintiffs have been damaged in such special damages as will be proven at time

of trial, emotional distress and general damages as will be proven at time of trial.

Seventh Claim

37. Plaintiffs reallege and incorporate by this reference the allegations contained in paragraphs 1 through 36 as though fully stated herein and for a Seventh Claim alleges and avers as follows:

38. That the fraudulent conduct of the Defendants constitute an overt concealment of a material fact since the Defendants knew on August 1, 1985, that the Punahou Regency PH 2 did not have a value of $900,000.00, but to obtain a windfall profit and real estate commission, deceived Plaintiffs to believing that the property had a value of $950,000.00.

39. That the Defendants have obtained unjust enrichment because of their active and overt fraud and misrepresentation and concealment, and the Plaintiffs request restitution of the Old Pali Road property, all profits made by

Defendants, recision and restitution of all real estate commissions received by Defendants, special and general damages to be proven at the time of trial.

Eighth Claim

40. Plaintiffs reallege and incorporate by this reference the allegations contained in paragraphs 1 through 39 as though fully stated herein and for an Eighth Claim alleges and avers as follows:

41. The intentional conduct of the Defendants as real estate broker, agents or salesperson and the Defendants Osterman in conspiring with other Defendants to deceive and defraud and misrepresent to the Plaintiffs is the basis for the imposition of Chapter 480 and Chapter 480-13 of the Hawaii Revised Statutes as to unfair and deceptive business practices entitling the Plaintiffs to treble damages.

Ninth Claim

42. Plaintiffs reallege and incorporate by this reference the allegations contained in paragraphs 1 through

41 as though fully stated herein and for a Ninth Claim alleges and avers as follows:

43. The conduct of the Defendants jointly and severally is so intentional, outrageous, gross, wanton, malicious and deceitful so as to be the basis for the imposition of punitive damages to be proven at the time of trial.

WHEREFORE, Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert pray for judgment jointly and severally against the Defendants Clyde H. Allison, Libbie & Company, Inc., a Hawaii corporation, Marion Libbie Kamisugi, Darlene M. Osterman, Herbert David Osterman, John Doe 1-5, Doe Corporation 1-5, Doe Partnership 1-5, and Roe Governmental Entity 1-5 in such special damages as will be proven at time of trial, such general damages as will be proven at time of trial, punitive damages as will be proven at time of trial, treble damages under Chapter 480 of the Hawaii Revised Statutes and Chapter 480-13 of the

Hawaii Revised Statutes, and in the alternative a recision of the agreement of sale and restitution of all commissions received and a lis pendens on the real property at 3762 Old Pali Road, costs of suit, attorneys' fees and such other relief as the Court deems meet and just.

Dated: Honolulu, Hawaii, October 13, 1988.

/s/ Ronald G. S. Au
RONALD G. S. AU
Attorney for Plaintiffs